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APPENDIX

JUN 1 1 - 1971

E. ROBERT SEAVER, CLERK

Supreme Court of the United States
October Trans, 1970-197/

No. 400 70 -5039

MARGARITA FUENTER, ET AL.,

Appellants,

ROBERT L. SHEVIN, ATTORNEY GENERAL, STATE OF FLORIDA. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED OCTOBER 22, 1976
PROBABLE JURISDICTION NOTED PERSUARY 22, 1971

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6060

MARGARITA FUENTES, ET AL.,

Appellants,

__v.__

ROBERT L. SHEVIN, ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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MARGARITA FUENTES, individually and as a class for all those similarly situated, APPELLANT

__vs__

ROBERT SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE & RUBBER COMPANY, APPELLEES

DESIGNATION OF RELEVANT DOCKET ENTRIES

November 20, 1969, plaintiff-appellant FUENTES' complaint for declaratory and injunctive relief filed in the United States District Court for the Southern District of Florida.

December 11, 1969, motions to dismiss and to strike filed by defendants PURDY and WILLIAMS.

December 15, 1969, defendant FAIRCLOTH's motion to dismiss filed.

December 30, 1969, appellant's amended complaint for declaratory and injunctive relief filed.

January 19, 1970, appellant's motion for summary judgment filed.

January 28, 1970, defendant FAIRCLOTH's motion to dismiss amended complaint filed.

February 9, 1970, order setting hearing on three judge jurisdiction and all pending motions for March 12, 1970.

February 24, 1970, appellant's motion for a leave to amend complaint and to join additional party-defendant filed.

March 13, 1970, appellant's second amended complaint for declaratory and injunctive relief filed.

DESIGNATION OF RELEVANT DOCKET ENTRIES

March 17, 1970, order entered granting appellant leave to amend complaint and to add FIRESTONE TIRE & RUBBER COMPANY as an additional party-defendant, dismissing defendants PURDY and WILLIAMS, denying defendant FAIRCLOTH's motion to dismiss, and denying without prejudice, appellant's motion for summary judgment.

April 6, 1970, defendant-appellee FIRESTONE's motion to dismiss second amended complaint and to strike filed.

April 9, 1970, defendant FAIRCLOTH's answer to second amended complaint filed.

April 30, 1970, appellant's renewed motion for summary judgment filed; stipulation of facts also filed (with all attached exhibits).

May 5, 1970, order entered denying FIRESTONE's motion to dismiss, granting FIRESTONE's motion to strike all references to a class action, holding appellant's renewed motion for summary judgment in abeyance and setting the cause for taking of testimony on May 22, 1970.

May 14, 1970, appellant's motion to modify order of May 4, 1970 filed.

May 21, 1970, FIRESTONE's answer to second amended complaint filed.

June 1, 1970, affidavit of Vincent G. Morgan in opposition to renewed motion for summary judgment filed by FIRESTONE.

August 21, 1970, opinion of the District Court entered denying the declaratory and injunctive relief sought by appellant and granting judgment to defendants-appellees.

September 9, 1970, final judgment entered for defendants-appellees.

September 29, 1970, appellant's notice of appeal filed.

DESIGNATION OF RELEVANT DOCKET ENTRIES

March 11, 1971, transcript of hearing on May 22, 1970 filed (with stipulation and evidentiary exhibits in inside cover of Court file):

- /s/ Bruce S. Rogow, Esquire Counsel for Margarita Fuentes, Appellant 622 N. W 62 Street Miami, Florida 33150
- /s/ Daniel S. Dearing, Esquire Counsel for The Honorable Robert L. Shevin, Appellee
- /s/ George W. Wright, Jr., Esquire Counsel for Firestone Tire & Rubber Company, Appellee

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 69-1359-Civ-WM

MARGARITA FUENTES, individually and as a class for all those similarly situated, PLAINTIFFS

vs.

EARL FAIRCLOTH, Attorney General for the State of Florida, E. WILSON PURDY, Sheriff of Dade County, Florida, and R. A. WILLIAMS, a Deputy Sheriff of Dade County, Florida, DEFENDANTS

AFFIDAVIT-Filed January 19, 1970

STATE OF FLORIDA)
COUNTY OF DADE)
SS.

BEFORE ME, a Notary Public, duly authorized to administer oaths and take acknowledgments, personally appeared MINNIE R. BURROWS, who, after first being duly cautioned and sworn, deposes and says:

- 1. That she is a legal secretary employed by E.O.P.I. Legal Services at 400 Northwest 5th Street, Miami, Florida.
- 2. That on January 14, 1970, she called the following bonding organizations in the City of Miami, Florida and asked for a quotation on a forthcoming bond in double the amount of the replevied property, to wit: \$408.10:
 - a) A B C Bonding & Insurance Co. 1674 Northwest 17 Avenue
 - b) Maynard Bonding or Ace Bonding Co.17 Northwest Miami Court

- e) All Courts Bonding Service Dade-Commonwith Building
- d) All Dade Bail Bonds 1342 Washington Avenue
- e) Hoskins Bonding Agency 742 Northwest 12th Avenue
- f) Flowers Bail Bonds 3372 Northwest 17th Avenue
- g) Curry Charlie Bail Bond 1404 Northwest 7th Avenue
- h) Assured Bonding Service 2020 Southwest 1 Street
- i) A-1 Bail Bonds 1481 Northwest 7th Street
- j) A & A Bonding Agency 1575 Northwest 14th Street
- k) All Florida Bonding 201 Northwest 14th Avenue
- 1) Tracy C. Bonding Agency 740 Northwest 12th Avenue
- 3. That of those companies called, only two (2) handled forthcoming bonds for the purposes of a replevin proceeding, to wit:
 - a) Maynard Bonding or Ace Bonding Co.
 17 Northwest Miami Court Miami, Florida
 - b) Hoskins Bonding Agency 742 Northwest 12th Avenue Miami, Florida

4. That for a forthcoming bond in the amount of \$408.10, Maynard Bonding Company required \$408.10 in cash, plus a twenty dollar (\$20.00) premium.

5. That Hoskins Bonding Agency required \$204.05 in cash, plus a ten dollar (\$10.00) premium for a forth-

coming bond in the amount of \$408.10.

6. That for a bond in the same amount Maynard Bonding Company would charge only ten dollars (\$10.00) if the affiant herein were a plaintiff rather than a de-

fendant in a replevin proceeding.

7. That for a bond in the same amount Hoskins Bonding Agency would charge only ten dollars (\$10.00) if the affiant herein were a plaintiff rather than a defendant in a replevin proceeding.

/s/ Minnie R. Burrows
MINNIE R. BURROWS
Affiant

Sworn to and Subscribed before me this 16th day of January, 1970.

/s/ Mark E. Polen Notary Public, State of Florida at Large

My Commission Expires:

Notary Public State of Florida at Large My Commission Expires Feb. 9, 1973 Bonded Thru Fred W. Diestelhorst

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 69-1359 Civ-WM

[File Endorsement Omitted]

MARGARITA FUENTES, individually and as a class for all those similarly situated, PLAINTIFFS

vs.

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE & RUBBER COMPANY, DEFENDANTS

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF—Filed March 13, 1970

I. JURISDICTION

1. This is an action brought by plaintiffs for declaratory judgment and for permanent injunction as authorized by Title 42, U.S.C. § 1983 and Title 28, U.S.C. §§ 2201 and 2202. The jurisdiction of this Court is invoked under Title 28, U.S.C., § 1343(3). This is a proper case for determination by a three judge court pursuant to Title 28, U.S.C. §§ 2281 and 2284 in that it seeks a preliminary and permanent injunction, restraining and enjoining the defendants from the enforcement and execution of Chapter 78 of Florida Statutes §§ .08, .10, .11, and .12, and pertinent parts of § .01, on the ground that said statutes are violative of the Fourth and/or Fourteenth Amendments of the United States Constitution.

2. This is a class action authorized by Rule 23(b) of the Federal Rules of Civil Procedure. Plaintiff brings this action on her own behalf and on behalf of all citizens or other persons similarly situated who now or in the future are or may become subject to a Writ of Replevin under the conditions and as outlined in the sections below. The class is so numerous as to make joinder of all members of the class impracticable. There are questions of law or fact common to the class; the claims

of the plaintiffs are typical of the claims of the members of the class, and the plaintiffs will protect and adequately represent the interests of the class.

II. PARTIES

3. MARGARITA FUENTES is a resident of the City

of Miami, Dade County, Florida.

4. Defendant EARL FAIRCLOTH is the Attorney General for the State of Florida. He is charged with the responsibility of appearing in and attending to in behalf of the state all suits in which the state may be a party or in anywise interested.

5. FIRESTONE TIRE AND RUBBER COMPANY is an Ohio corporation, registered in Florida and doing business at 1200 West Flagler Street in the City of

Miami, Florida.

III. STATEMENT OF FACTS

6. On or about June 24, 1967, plaintiff purchased a gas stove from the defendant FIRESTONE TIRE AND RUBBER COMPANY, also known as FIRESTONE STORES, located at 1200 West Flagler Street in the City of Miami, Florida. On information and belief, FIRESTONE TIRE AND RUBBER COMPANY is an Ohio corporation. On or about December 21, 1967, plaintiff purchased a stereo set from the same corporation. Copies of these transactions are attached to plaintiff's

original Complaint as Exhibit "A".

7. On or about September 15, 1969, defendant FIRE-STONE TIRE AND RUBBER COMPANY made a demand upon said goods by submitting an affidavit in replevin to the Small Claims Court of Dade County, Florida, causing a Writ of Replevin to issue directed to all and singular the sheriffs and constables of the State of Florida to replevy the aforenamed goods and chattels. This was effectuated shortly thereafter by R. A. Williams, a Deputy Sheriff of Dade County. Copies of said affidavit and the ensuing Writ were attached to plaintiff's original Complaint as Exhibit "B".

8. Said Writ of Replevin was issued without a prior hearing of any kind afforded to plaintiff to determine the legitimacy of said demand, nor was she given notice of the repossession of the named goods and chattels prior to their taking, nor-did she freely consent to the entering of her home by peace officers. A trial date was set in the above named Court, in the matter of Firestone Tire and Rubber Company v. Margarita Fuentes and has been continued pending further proceeding in this Court.

9. Plaintiff believes she has a meritorious defense to

the repossession of said goods and chattels.

10. On information and belief, defendant FAIRCLOTH and his agents, servants and employees, have committed, authorized, permitted or condoned other similar acts, all under color of the replevin statutes, namely: unreasonably breaking or entering, with or without prior notice, into private premises, and searching and seizing goods therein, without search warrants issued by a magistrate upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the things to be seized. Each of said acts constitutes an unreasonable search and seizure, a trespass, and a seizure of property without due process of law. The exact number of such acts is unknown to plaintiff and her class but well known to the defendant.

IV. CAUSE OF ACTION

11. Plaintiff, for herself and the class which she represents, contends that the replevin statutes under which said Writ was issued are unconstitutional on their face and contrary to the guarantees of the Fourth and Fourteenth Amendments to the Constitution of the United States. In actions for the recovery of personal property, procedures for effecting summary repossession of said property are governed by Chapter 78 of the Florida Statutes, a copy of which was attached to plaintiffs' original Complaint as Exhibit "C". Upon proper compliance with certain procedural requisites (see paragraph 12 infra) by claimant in such an action, the sheriff, or constable of the county in which the claimed property is found

must seize and take said property, by force if necessary, without prior notice to either the alleged debtor or to the custodian of said property, and without hearing of any kind to determine the merits of the alleged debtor's claim, and regardless of whether the alleged debtor has been served with summons and complaint. If said property is located in a private dwelling or other private building or enclosure, said peace officers must publicly demand the delivery of said property, and if it be not delivered, must break and enter the premises and take the property into their possession, by force if necessary. No search warrant, nor any prior notice to the alleged debtor, nor hearing of any kind to determine the merits of claimant's claim is required or permitted.

12. The pertinent portions of the replevin statutes are

set forth below:

78.01 Right to Replevin

Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided . . .

78.08 Writ; form; return

The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.

78.10 Writ; execution on property in buildings, etc.

In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof and if it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.

78.11 Writ; execution on property changing possession, etc.

If the property to be replevied is in the possession of defendant at the time of the issuance of the writ, and passes into the possession of a third person before the execution of the writ, the officer holding the writ shall execute it on the property in the possession of the third person and shall serve the writ and summons on defendant and the third person, and the action with proper amendments, shall proceed against the third person.

78.12 Writ; execution on property removed from jurisdiction

At the time of the service of the writ if the property to be replevied is outside the territorial jurisdiction of the court issuing the writ, the officer to whom the writ is directed shall deliver it to the proper officer in the jurisdiction into which the property has been removed, and the latter officer shall execute the writ, and shall hold the property subject to the orders of the court issuing the writ.

13. Said statutory scheme, and specifically §§ .08, .10, .11, and .12, and the pertinent parts of § .01 of Chapter 78 of the Florida Statutes, insofar as they purport to authorize and require peace officers to enter and search private premises, and seize and take personal property, by force if necessary, and otherwise invade persons' privacy and deprive them of their rights and liberties, all unreasonably and without requiring the issurance by a magistrate of a warrant based upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the things to be seized, is on its face in violation of Amendments Four and Fourteen of the United States Constitution.

14. There is between the parties an actual controversy as hereinbefore set forth. The plaintiff and the class which she represents are suffering irreparable injury and are threatened with irreparable injury in the future

by reason of the acts herein complained of; plaintiff has and the class which she represents have, no plain adequate or complete remedy to redress the wrongs and unlawful acts complained of, other than this action for a declaration of rights and injunction; any other remedy to which plaintiff and the class which she represents could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury, damage and inconvenience to plaintiff, and to the class which she represents.

II.

- 15. Plaintiff and her class repeat and reallege each and every allegation in paragraphs one through fourteen with the same force and effect as if fully set forth herein.
- 16. Said statutory scheme, and specifically §§ .08, .10, .11, and .12, and the pertinent parts of .01 of Chapter 78 of the Florida Statutes, insofar as they purport to authorize and require peace officers to enter an alleged debtor's private premises and to take personal property found therein, without prior timely notice to him and without affording him a prior timely opportunity to be heard concerning the merits of claimant's claim, is on its face in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

WHEREFORE, plaintiff and the class which she represents pray this Court:

- A. Assume jurisdiction of this cause and convene a three judge court pursuant to the appropriate enabling statutes;
- B. Enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, declaring Chapter 78 §§ .08, .10, .11, and .12 and the pertinent parts of s. .01 which allow for Writs of Replevin before judgment, and any other parts thereof found to be constitutionally infirm, to be violative of the Fourth and/or Fourteenth Amendments of the United States Constitution.

C. Upon due notice temporarily and upon Final hearing permanently enjoin the defendants, their agents, servants and employees from enforcing the aforenamed sections.

D. Enjoin the defendants from continuing to hold the aforenamed stove and stereo of the named plaintiff, or such of them that may have possession and/or control of

same.

E. And grant such other and further relief as may be deemed proper by this Court.

Respectfully submitted,

/s/ C. Michael Abbott, Esquire Donald C. Peters, Esquire Bruce S. Rogow, Esquire Alfred Feinberg, Esquire Attorneys for Plaintiff 400 Northwest Fifth Street Miami, Florida 33128 Telephone: 377-0917

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 69-1359-Civil-WM

[File Endorsement Omitted]

MARGARITA FUENTES, individually and as a class for all those similarly situated, PLAINTIFF

vs.

EARL FAIRCLOTH, Attorney General for the State of Florida, E. WILSON PURDY, Sheriff of Dade County, and R. A. WILLIAMS, a Deputy Sheriff of Dade County, Florida, DEFENDANTS

ORDER-March 17, 1970

Upon consideration, it is ORDERED:

1. Plaintiff's motion to proceed in forma pauperis is denied without prejudice to renew if appropriate at some future date.

2. Landy's motion to intervene as plaintiff is denied.

3. Plaintiff's motion to amend her complaint to add Firestone as additional party defendant is granted.

4. Motions of defendants Williams and Purdy to be

dismissed from this suit are granted.

5. Motion of defendant Faircloth to dismiss is denied.

6. Plaintiff's motion for summary judgment is denied without prejudice to renew if appropriate at a future date. Ruling on the summary judgment is not intended to resolve the contention of the plaintiff that the statute is facially unconstitutional.

ENTER: March 17, 1970

- /s/ David W. Dyer Circuit Judge
- /s/ W. O. Mehrtens District Judge
- /s/ Joe Eaton District Judge

[SEAL]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 69-1359-Civ-WM

[File Endorsement Omitted]

(Three Judge Federal Panel)

MARGARITA FUENTES, individually and as a class for all those similarly situated, PLAINTIFFS

__v__

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE & RUBBER COMPANY, DEFENDANTS

MOTION TO DISMISS SECOND AMENDED COMPLAINT— Filed April 6, 1970

The defendant, The Firestone Tire and Rubber Company, by its undersigned attorneys, moves the Court for the entry of an order dismissing the plaintiffs' second amended complaint for declaratory and injunctive relief on the following grounds:

1. The second amended complaint fails to state a claim upon which relief can be granted.

2. The second amended complaint is improperly

brought as a class action.

3. The Court lacks jurisdiction over the subject matter of this action.

Mershon, Sawyer, Johnston, Dunwody & Cole Attorneys for Defendant, Firestone Tire and Rubber Company 1600 First National Bank Building Miami, Florida

By /s/ George W. Wright, Jr.

By /s/ Daniel S. Dearing

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 69-1359-Civ-WM

[File Endorsement Omitted]

(Three Judge Federal Panel)

MARGARITA FUENTES, individually and as a class for all those similarly situated, PLAINTIFF

-v-

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

MOTION TO STRIKE-Filed April 6, 1970

The defendant, The Firestone Tire and Rubber Company, by its undersigned attorneys, moves the Court for the entry of an order striking from the plaintiffs' second amended complaint for declaratory injunctive relief the following allegations:

1. The words "and as a class for all those similarly situated" contained in the style of this action;

2. All of paragraph No. 2 of the second amended

complaint;

3. The words "and the class which she represents" contained in paragraphs 11 and 14 and the first paragraph of the prayer of the second amended complaint;

4. The words "and her class" contained in paragraph

15 of the second amended complaint;

upon the grounds that this is an improper and unauthorized class action and the aforesaid allegations are, therefore, impertinent and immaterial.

MERSHON, SAWYER, JOHNSTON,
DUNWODY & COLE
Attorneys for Defendant, The Firestone Tire and Rubber Company
1600 First National Bank Building
Miami, Florida

By /s/ George W. Wright, Jr.

By /s/ Daniel S. Dearing

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 69-1359-Civil-WM

[File Endorsement Omitted]

MARGARITA FUENTES, individually and as a class for all those similarly situated, PLAINTIFFS

EARL FAIRCLOTH, Attorney General for the State of Florida, E. WILSON PURDY, Sheriff of Dade County, and R. A. WILLIAMS, a Deputy Sheriff of Dade County, Florida, DEFENDANTS

ANSWER-Filed April 9, 1970

COMES NOW, Earl Faircloth, Attorney General, State of Florida, and makes this his answer to the Amended Complaint for Declaratory and Injunctive Relief heretofore filed in this cause and says:

- 1. The provisions of Sections 78.08, 78.10, 78.11, 78.12, and 78.01, Florida Statutes, are not violative of the Fourth and Fourteenth Amendments of the United States Constitution.
- 2. Plaintiff's suit is not a proper subject for class action under Rule 23(b) of the Federal Rules of Civil Procedure.
- 3. Defendant admits that Plaintiff is a resident of the City of Miami, Dade County, Florida.

4. Defendant admits the allegations contained in para-

graph 4 of the amended complaint.

5. Defendant admits that E. Wilson Purdy is the Sheriff of Dade County, Florida, and charged with the duty of executing all process placed in his hands in accordance with Florida Statutes.

6. Defendant admits that R. A. Williams is a Deputy Sheriff, Dade County, Florida, and charged with the duty of executing all process placed in his hands in ac-

cordance with Florida Statutes

7. Defendant is without actual knowledge of the allegations contained in paragraph 7, but would admit that Plaintiff's Exhibit A indicates that one Margarita Fuentes purchased a stove and stereo from Firestone Tire and Rubber Company and voluntarily executed a retail installment contract for the payment thereof which specifically provided that the seller shall retain title and right of possession until the items are paid for in full. That in event of default of any payment or payments, the buyer Margarita Fuentes agreed that the seller Firestone Tire and Rubber Company may take back the merchandise. That the terms and conditions of the contract voluntarily executed by one Margarita Fuentes do not violate any State of Florida or United States law or constitutional provision thereof.

8. Defendant admits that the record on file in the Small Claims Court, Dade County, Florida, in case No. 205376, styled Firestone Tire and Rubber Co. vs. Fuentes, reveals that a writ of execution was issued by the Court directed to all and singular the Sheriffs and Constables of the State of Florida after an affidavit and bond by Firestone Tire and Rubber Company were filed and posted in double the amount of the declared value of the

items enumerated in Plaintiff's Exhibit A.

9. Defendant admits that a Writ of Replevin was issued upon the filing of an affidavit and posting of a bond in double the amount of the declared value of the goods sought to be replevied without a hearing or trial to determine the legitimacy of Firestone Tire and Rubber Co.'s demand. Defendant denies that Margarita Fuentes did not freely consent to the entering of her home by police officers. Defendant admits that a trial date was set in the Small Claims Court, Dade County, Florida, in the matter of Firestone Tire and Rubber Co. vs. Margarita Fuentes and that said cause was continued at Margarita Fuentes' request pending proceedings in this Honorable Court.

10. Defendant denies that Plaintiff Margarita Fuentes has a meritorious defense to the repossession of items as enumerated in her Exhibit A and which are the sub-

ject matter of a cause pending in the Small Claims Court. Dade County, Florida. Defendant would further represent unto this Honorable Court that Plaintiff Margarita Fuentes has failed to allege that she is not in default of payment under the terms of the contract voluntarily entered into and attached to her complaint as Exhibit A. Plaintiff further fails to allege that she was entitled to right of possession at the time the items as enumerated in her Exhibit A were replevied.

11. Defendant denies each and every allegation con-

tained in paragraph 11.

12. Defendant denies that the replevin statutes contained in Chapter 78, Florida Statutes, are unconstitutional and contrary to the Fourth and Fourteenth Amendments to the United States Constitution. Defendant disagrees with Plaintiff's interpretation of the provisions of Chapter 78, Florida Statutes, as contained in

paragraph 12.

13. Defendant admits that Sections 78.01, 78.08, 78.10, 78.11, and 78.12, Florida Statutes, are pertinent portions of the Florida Statutes pertaining to replevin. However, an essential requisite under Chapter 78, Florida Statutes, before a replevin writ shall issue is requirement for the posting of a bond as contained in Section 78.07 as follows:

"Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action."

14. Defendant denies the allegations contained paragraph 14.

15. Defendant denies the allegations contained in paragraph 15.

16. Defendant denies the allegations contained in paragraph 16.

17. Defendant denies the allegations contained in

paragraph 17.

WHEREFORE, having fully answered Plaintiff's Amended Complaint for Declaratory and Injunctive Relief, Defendant Earl Faircloth, Attorney General, State of Florida, respectfully moves this Honorable Court for the entry of an order discharging him as a party defendant and dismissing said amended complaint.

Respectfully,

EARL FAIRCLOTH Attorney General

- /s/ T. T. Turnbull
 Assistant Attorney General
- /s/ Edwin E. Strickland
 Assistant Attorney General
 The Capitol
 Tallahassee, Florida 32804

[Certificate of Service (Omitted in Printing)]

EXHIBIT 2

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

AFFIDAVIT

STATE OF FLORIDA)
ON SS.
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared JONATHAN P. ROSE, who, after first being duly cautioned and sworn deposes and says as follows:

- 1. That I am a third year student at the University of Miami Law School and will be graduated in June of 1970.
- 2. That I have examined the replevin cases filed in the Small Claims Court of Dade County, Florida, under Chapter 78 of the Florida Statutes for the period from January through December of 1969.

3. That my examination revealed that a total of 442

replevin cases were so filed during this period.

4. That all of these cases were pre-judgment replevins.

5. That 300 of these 442 cases have come to judgment as of April 10, 1970.

6. That 59 defaults were entered in these 300 cases.

7. That 9 break orders were issued authorizing forced entry.

8. That in none of the 442 cases filed did the defendant post a bond within three days as permitted by F.S.A. § 78.13.

/s/ Jonathan P. Rose JONATHAN P. ROSE Affiant

Sworn to and Subscribed before me this 14th day of April, 1970.

/s/ Minnie R. Burrows Notary Public, State of Florida at Large

My Commission expires. Notary Public, State of Florida at Large My Commission Expires Oct. 14, 1973 Bonded Thru Fred W. Diestelhorst

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 69-1359-Civ-WM

[File Endorsement Omitted]

(Three Judge Federal Panel)

MARGARITA FUENTES, individually and as a class for all those similarly situated, PLAINTIFF

-v—

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

STIPULATION OF FACTS—Filed April 30, 1970

It is hereby stipulated and agreed upon by and between the plaintiff, MARGARITA FUENTES, and the defendants, EARL FAIRCLOTH, Attorney General for the State of Florida, and THE FIRESTONE TIRE AND RUBBER COMPANY, through their undersigned attorneys of record, as follows:

—I—

Plaintiff, MARGARITA FUENTES (hereinafter referred to as Mrs. Fuentes) is and was at all times material to this action a resident of Dade County, Florida. Defendant, THE FIRESTONE TIRE AND RUBBER COMPANY, (hereinafter referred to as Firestone) is and was at all times material to this action a corporation duly incorporated and existing under the laws of the State of Ohio, with its principal office in that State, and authorized to transact business in the State of Florida. At all times material to this action, Firestone owned and operated a retail store, No. 2627, located at

1200 Flagler Street, Miami, Dade County, Florida, from which Firestone sold to the general public various items of merchandise.

—II—

Mrs. Fuentes had made six installment purchases from Firestone on time-payment contracts previous to the one giving rise to this action and had paid for them. Although Plaintiff is unable to stipulate to the following details which describe these installment purchases, Firestone contends the following based upon its credit records:

Mrs. Fuentes applied for credit with Firestone on January 31, 1964. She represented herself as a 49-year-old divorcee who had lived at 137 S.W. 10th Avenue, Miami, for five months. She had been employed by Geneie of Miami, an apparel factory, for one and a half years as a sewing machine operator. She was paid \$60.00 per week. She had very good credit reference with Ideal Trading Co., Inc., which indicated a credit history dating from 1962. Firestone approved her. The next day she bought a console T.V. and took out a service policy. A year later, she bought a toaster, and in the fall of the following year, she bought a refrigerator.

On October 30, 1965, Mrs. Fuentes opened another account with Firestone. Her address was then 1275 S.W. 1st Street. She purchased two bicycles. She paid for

them in fourteen installments.

She next applied for credit with Firestone on March 29, 1967. She represented that she had rented a home at 112 S.W. 11th Avenue, Miami, Florida, for longer than a year, and that she had been employed by Mr. Dino's as a sewing machine operator for a year with a monthly salary of between \$300.00 and \$399.00. Her credit references and employment were verified. A credit limit was granted of \$495.00.

<u>—III—</u>

On June 24, 1967, Mrs. Fuentes purchased from Firestone (through its Store No. 2627) a gas stove for

\$139.95 together with a \$14.95 policy assuring her free service for one year. With sales tax of \$4.66, handling charges of \$20.67 and documentary stamp of \$.30, the total time balance was \$180.53, to be paid in 17 equal installments of \$11.00. A copy of the installment sales

contract is attached hereto as Exhibit A.

During the course of approximately one year from the date of her purchase, Mrs. Fuentes complained on more than one occasion of mechanical problems with her stove. Firestone asserts that satisfactory repairs were made which included replacement at no charge to Mrs. Fuentes of stove burners. Mrs. Fuentes alleges that if such repairs were made, they were not made to her satisfaction. Firestone denies this allegation.

On November 27, 1967, Mrs. Fuentes purchased from Firestone (through its Store No. 2627) a Philco stereo set for \$398.75 and a service policy of \$12.50. Documentary stamp charges of \$.90 and sales taxes of \$12.47

brought the net cash price to \$424.62.

A down payment of \$40.00 was made, leaving a net

cash balance of \$384.62.

The balance remaining unpaid on her gas stove (\$136.53) less a refund of part of the handling charge (\$10.20) brought the total cash balance for both the gas stove and stereo to \$510.95. To this was added a new handling charge of \$101.80 for a total time balance of \$612.75 for both the gas stove and stereo, to be paid over 24 months commencing December 2, 1967. Each installment was to be in an amount of \$26.00. A copy of the installment sales contract is attached hereto as Exhibit B.

On February 6, 1968, Mrs. Fuentes made a payment in the amount of \$30.00. She made \$30.00 payments on March 15, and April 9. On May 21, she made a \$26.00 payment, and on June 5, a \$6.00 payment. On July 3, she paid \$20.00. On July 15, she made a payment of \$208.70.

The effect of this last payment was to prepay installments through March, 1969. The required April, 1969, installment payment in the sum of \$26.00 was not made. A notice was mailed to Mrs. Fuentes. The required

May, 1969, installment payment in the sum of \$26.00 was not paid. A telegram was sent to her on May 12, 1969, to the effect that she was required to pay the past-due account of \$204.05 that day, or return the merchandise. The form telegram was sent by the store credit manager, Mr. John D. Daley. She failed to pay.

On September 15, 1969, Firestone filed in the Small Claims Court in and for Dade County, Florida, under

Case No. 205376, the following pleadings:

A. Statement of claim, true copy of which is attached hereto and by reference made a part hereof as Exhibit C.

- B. Affidavit in replevin, true copy of which is attached hereto and by reference made a part hereof as Exhibit D.
- C. Replevin bond, true copy of which is attached hereto and by reference made a part hereof as Exhibit E.

On September 15, 1969, the date of filing the foregoing pleadings by Firestone, Mrs. Fuentes had not made certain payments according to the schedule of payments in Exhibit B. She was then indebted to Firestone in the total sum of \$204.05 as the balance due upon the total purchase price for the aforesaid gas stove and stereo.

On September 15, 1969, the Clerk of the Small Claims Court in and for Dade County, Florida, pursuant to the aforelisted pleadings, issued a writ of replevin, true copy of which is attached hereto and made a part hereof as Exhibit F. Said writ of replevin was delivered on the same date to the office of the Sheriff of Metropolitan Dade County, Florida, for service upon Mrs. Fuentes and execution upon the aforesaid gas stove and stereo under and pursuant to the provisions of Chapter 78, Florida Statutes, 1967.

On September 15, 1969, at approximately 5:00 o'clock p.m., Robert Arthur Williams, a Deputy Sheriff in the office of the Sheriff of Metropolitan Dade County, went to the residence of Mrs. Fuentes, located at 112 S.W. 11th Avenue, Miami, Florida, to serve upon Mrs. Fuentes the statement of claim and the writ of replevin and to

execute the writ of replevin upon the aforesaid gas stove and stereo. Two employees of Firestone, Mr. David Daley and Mr. Ricardo Rodriguez, met Deputy Williams at

this location with a Firestone truck.

Upon arrival, Deputy Williams went to the door of the Fuentes residence. The main front door was open. A screen door was closed. A woman and two boys were in the living room. Deputy Williams knocked on the door. He asked in English to see Mrs. Fuentes. The person who came to the door was Leonor Delgado, the plaintiff's daughter-in-law. She does not speak English and apparently did not understand Deputy Williams. At this point, the stories of the parties differ. Deputy Williams alleges that two small boys, Hugo Delgado, age twelve, and Ricardo Delgado, age ten, were within the house and, both being bi-lingual, understood him and invited him in at that time and he entered the living room pursuant to this invitation. Mrs. Fuentes concedes that the boys were within the house and that they are bi-lingual, but denies that the Deputy Sheriff entered the home at that point. Her contention is that Deputy Williams stayed on the porch at this time while the parties spoke through the screen door. She admits and contends that Deputy Williams was invited into the house and entered the house only after Mr. Leon, her son-in-law, later arrived at her home, as hereinafter set forth.

Deputy Williams mistook Mrs. Delgado for Mrs. Fuentes. Mrs. Fuentes was in the living room at the time. He identified himself and announced that he was there to repossess a stove and a stereo set for Firestone. He showed them the writ and the statement of claim and explained that he was there under court order to pick up the merchandise. There was a difficult communications problem. Neither of the two women seemed to him to speak or understand English. The two boys translated. Gradually, Deputy Williams was able to communicate his purpose and the effect of the writ and statement of claim. A true copy of the return of service is attached hereto and made a part hereof as Exhibit F-1.

Mrs. Delgado, who also lived in the house, then became "upset and emotional". She protested the repossession.

She asked for time for Mrs. Fuentes to contact Joaquin Leon. Mrs. Fuentes' son-in-law, who would assist her in

the matter. Deputy Williams agreed to wait.

At the request of Mrs. Fuentes, Mr. Leon immediately left work and drove the two blocks from his place of business to the Fuentes residence. He introduced himself in English to Deputy Williams. He explained that his attorney had advised him that a court proceeding was necessary before the merchandise could be repossessed, and that, on his advice, he was not going to give

up the property.

Deputy Williams explained the effect of the writ to Mr. Leon, that he was obliged to repossess the stove and stereo in accordance with its terms. According to Mrs. Fuentes, Mr. Leon then agreed that the Deputy Sheriff, Mr. Daley and Mr. Rodriguez could come into the house and repossess the merchandise. It was indicated to Deputy Williams that the stereo was in the living room and that the gas stove was on an open porch at the back of the house.

Mr. Daley and Mr. Rodriguez of Firestone had parked the Firestone truck in the driveway of the Fuentes residence and were waiting outside on the front porch. Deputy Williams called them into the living room where he pointed out the stereo. He also directed them to the gas stove. The two men picked up the stereo, took it outside, and loaded it on the truck. They then went to the rear of the house to pick up the gas stove. It was not connected in any way to gas lines or to the house. They carried it to the front and loaded it upon the Firestone truck. Another stove was located in the kitchen of the Fuentes home at the time that Daley and Rodriguez picked up the stereo and gas stove for Firestone.

Neither Daley nor Rodriguez had any conversation with anyone inside or outside of the Fuentes home other than Deputy Williams. After Mr. Leon agreed that Deputy Williams could repossess the merchandise, no one objected to Daley or Rodriguez repossessing the stove and stereo. The only conversation which they had with Deputy Williams was, first, in the living room of the Fuentes home, wherein Deputy Williams directed them to the items to be replevied, and, second, on the front porch of the Fuentes home, after they had loaded the merchandise onto the truck, when Deputy Williams requested Mr. Daley to sign a receipt to the Sheriff's office for the gas stove and stereo. A true copy of the return of service of the aforesaid writ of replevin upon the stove and stereo is attached hereto and by reference made a part hereof as Exhibit F-2.

v

The aforesaid action instituted by Firestone against Mrs. Fuentes in the Dade County Small Claims Court was initially set for September 30, 1969, as appears on the statement of claim (Exhibit C). On that date, the Court, upon oral motion of the attorney for Mrs. Fuentes, entered an order continuing trial of the cause until December 15, 1969, at 3:00 p.m., a true copy of which order is attached hereto and made a part hereof as Exhibit G.

On November 20, 1969, Mrs. Fuentes filed in this Court her initial complaint for declaratory and injunctive relief. Pursuant to motion for continuance, filed by Mrs. Fuentes in the Small Claims Court, a true copy of which motion is attached hereto and made a part hereof as Exhibit H, that Court entered an order bearing date December 5, 1969, a true copy of which is attached hereto and made a part hereof as Exhibit I, continuing the action filed by Firestone against Mrs. Fuentes pending further proceedings in the case sub judice, and no further proceedings have since been held in said cause in the Dade County Small Claims Court.

VI

The parties hereto reserve the right to adduce testimony and evidence before the Court as to all facts relevant and material to the issues involved in this action not specifically stipulated to herein and/or as to all facts wherein this stipulation reflects and recites adverse contentions or a dispute between the parties as to such facts. The parties further reserve the right to object at final

hearing or at hearing upon any motions, including, but not limited to, motions for summary judgment, to the admissibility of any of the facts herein stipulated upon the grounds of irrelevancy and immateriality to the issues involved herein.

DATED this 29th day of April, 1970.

BRUCE S. ROGOW, ESQUIRE; ALFRED FEINBERG, ESQUIRE 622 N.W. 62 Street Miami, Florida Of Counsel for Plaintiff

> C. MICHAEL ABBOTT, ESQUIRE; DONALD C. PETERS, ESQUIRE; RENE V. MURAI, ESQUIRE 400 Northwest Fifth Street Miami, Florida 33128 Attorneys for Plaintiff

By /s/ C. Michael Abbott
Mershon, Sawyer, Johnston,
Dunwody & Cole
1600 First National Bank Building
Miami, Florida 33131
Attorneys for The Firestone Tire
and Rubber Company

By /s/ George W. Wright, Jr. EARL FAIRCLOTH Attorney General

By /s/ T. T. Turnbull

[Mershon, Sawyer, Johnston, Dunwody & Cole, Received, /s/ [Illegible], April 6, 1970, Time, 8 a.m., Reference]

STATE OF FLORIDA DEPARTMENT OF LEGAL AFFAIRS THE CAPITOL

TALLAHASSEE, FLORIDA 32304

[State Seal]

EARL FAIRCLOTH Attorney General

April 1, 1970

Honorable George Wright 1600 First National Bank Building Miami, Florida 33131

Re: Fuentes v. Faircloth, et al.

Dear Mr. Wright:

This will confirm our conversation at approximately 3:30 p.m. this date in which I have given you my authority to sign my name as Chief Trial Counsel for the Attorney General on a stipulation of fact which you and counsel for Plaintiff in the case of Fuentes above noted have been designated to file with the Court. I will, of course, file for the Attorney General and the State, within the proper time, an answer in view of the fact that our Motion to Dismiss was denied. We are only concerned, however, with the constitutionality of the statute and not with the factual situation as we discussed.

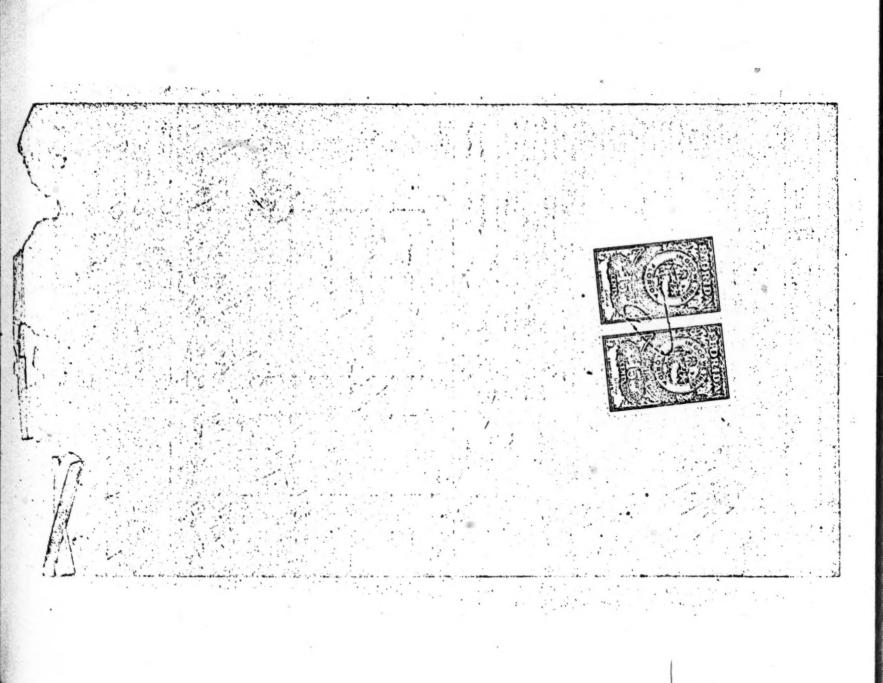
I am including three copies of this letter to you so that you may use them as you see fit to file in the Court with the stipulation.

With kind regards.

Sincerely yours, For the Attorney General:

/s/ T. T. Turnbull T. T. TURNBULL Chief Trial Counsel

TTT/pr Enclosures SALES ACCOUNTING STATES HET TOTAL TIME BALANCE H AMCOUNT THIS SACE (A) 615-7



MOPFIEL ン・ソーケー Starting LATE PATO IN PULL PRIOR AGIET MENTS F. LESS PANDLING CHAPGE REFUND CASH PRICE (F FAID IN 35 CAYS. TOTAL THES BY SALES CASH BACANCE NACO NACO A TE SO TIME BALANCE CHANGLING 3 TOTAL Very crate DATE. 36 CC. IN 347 er if it certains my thank spane(s). It you are esticled to a consistent filted in the certains extra the consistent man you have not been the first consistent man in the standard man, you have not selected man to the standard man, and the standard consistent man of the standard consistent man of the standard consistent is not to the standard consistent in the standard consistent man of the standard consistent consistent man of the standard consistent consistent man of the standard consistent consistent consistent consistent consistent consistent. WILEAGE USE responsible for all lesses or and damage to The undersigned Buyer agrees to pay to the Presone fire & Rubber Conpany or it order the anount shown in Item I in the table of the right hereof, including any prior line payment agreements which may be incoparated herein by reference, payable to shown in said table. Until NOTICE TO THE RUYER: 1. Do not sign this control belone you cost it. If it certains my dien's span(s). I. You are eatherd to a completely filed 516.23 ich payment has been made Buyer ogniss thats Sollar shall retain Hile nd right of passission of sold merchandies Euyer will not sell, remove or et its epiten may take back the marchandise or affice thy sais and uyer liable for the unpoid balance, induding any delinquency or affection charge where permitted by law. Except for standard warrantles POSTING serveen the parties. ACCOUNTING CAREERED :09.16 HAESTONE TIRE A RUBERR COMPANY Store Mgr. とら בבובה אינו クスク entiro egruement merchandles and in the event of default NET TOTAL THE BALANCE H/C TIRE VALVES 728~73 331019ka foregoing constitutes the AMOUNT THIS SALE (A) Sher to - Senondel Seller (fi ADDRES 1

928502 ... If you wish to have witnesses summoned, see the Clerk at once for assistance. .

If you dosire to file any counterclaim or set-off to plaintiff's said claim, it must be filed in Court by you or your attorney IN WRITING at least five (5) days prior to the above date set for This Court will hoor and try this claim on SELDO 1509, 1968; at Grap 111. M., at 1351 N. W. 12th Street, Miaml, Plorida, on the Pourth Floor of the Metropolitan Justice Building, before the Honorable Judge, WHOSE NAME IS STAMPED IN RED ON THIS SUMMONS.

You are required to be present at the hearing at the time required in order to avoid a judgment Fla ., as shown by the foregoing statement, to jether with you have witnesses, books, receipts, or other writings bearing on this claim, you should defendan t You are hereby notified that the above named plaintiff has made a claim and is requesting judgment against you in the sum of \$ 20th 05 , as shown by the foregoing statement, to settler with Small Claims Court on a Miami, Address Defendant Division "C" the JUDGE PLINY DOW (or Art 9:00 Plaintiff sues the defendant for that defendantsed the following described personal property conditional sales contracts dated as follows, and no the return of for costs of 6-24-67 (1) 5C207 Gas Range 11-21-67 (1) 1837WA Philoo Stereo Margorita Fuentes AVE Clork, Dode County 1969 anon Deputy Clerk 1968. Ave. Mami Fla. J.D. Dull CY foregoing is a just and true statement of the amount coving by defendant to plaintiff just grounds of defence. Plaintiff states that defendant(s) is/are not in the military, a 11 FRIEG THE POTTION WITH YOU AT ALL, THUS SEP 3 0 1989. Wherefore plaintiff demands merchandise together with a judgement 112 S.W. NOTICE TO APPEAR (SUMMONS) PLC CIDA STATEMENT OF CLAIM ECWARD B. MILLER, (1) alliana Defendant F oblo Corp. D/B/A Rubber OADE COUNTY, restone Stores. court costs and any further costs which may accrue. Youmay come with or without an attorney. Doted or Miami, Florida, this. day of _ TO: Margarita Fuentes 112 S.W. bring them with you at the time of the hearing. W. W. W. F. C. J. S. Plaintiff Address Attorney for Plaintiff to pay. by default against you. refuses The State of Florida: Š STATE OF FLORIDA, trial of said claim. Flagler Telephone Number DADE COUNTY 119 44 - 1 RULE NO. Trestone Address 200 W. Tel

Plaintiff, & Rubber Co. Tire & D/B/A The Firestone Tires an Obio Corp. D/B, Firestone Stores

Defendant.

Margorita Fuentes

AFFIDAVIT IN REPLEVIN

agent of the above named plaintiff; that said plaintiff is lawfully entitled to the possession of the following Before me personally appeared the undersigned who being by me first duly sworn says that he is the described personal property, to-wit:

50207 Gas Rango 1837WA Philos Stereo

; that said property has not been execution or attachment against the goods and chattels of said plaintiff liable to execution and that the above named defendant has possession of the above described personal property and detains the sum from said Division "C" taken for any tax, assessment or fine levied by virtue of any law of the State of Florilla, nor seized under any JUDGE PERPY That the true value of said property is the sum of \$ 2014.05 plaintiff in the Caunty of Pade, State of Florida.

Swing to and subscribed before me this

EXHIBIT

alline by the course of the co

an Ohio corporation AND RUSDER COPPENY PIREGIONE

Plaintiff,

MARGARITA FUENTES

Defendant

REPLEVIN BOND

in the sum of FIGHT - UNDRED EIGHT & 10/100 (\$408,10) MARGARITA FUENTES

Dollars, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

day of Sept. 15th Signed and sealed this

The condition of the above obligation is such, that whereas the said PIKESTONE TIRE AND RUBBER han this day begun an action of Replevin to recover possession of CEMPANY A/b/a FIRESTONE STRUES oi Ohio

1 5C207 Gas Rango, 1 1837 MA Philos Stereo

personal property, to-wit:

PIRESTONE TIRE AND RIBBER COMPANY A/D/A FIRESTONESTORES Dollars. shall diligently prosecute the said action and return the said property to the said 4 5/100 (\$204,05) TWO MUNDERED FOUR NOW THEREFORE, If the said

. If return thereof shall be adjudged, and shall pay him all such sums of money as may for any cause be recovered against said plaintiff by such defendant in said action for any cause whatever, then this obligation to be vold, else it remain of full force and virtue.

Taken before and approved by me,

(SEAL) AND RUBBER COMPANY A Principal FIRESTONE STONES TIRE PIRESTONE

(SEAL)

By Section

INTERSTAND FIRE INSURANCE

WRIT OF REPLEVIN

TO ALL AND SINGULAR THE SHERIFFS AND CONSTABLES OF THE STATE OF FLORIDA: IN THE NAME OF THE STATE OF FLORIDA

You are hereby commanded to replevy the goods and chattels described as follows:

(1) 5C207 Gad Range (1) 1837WA Philco Stereo

Margarita Fuentes 112 S.W. 11 Ave. Miami Fla. in possession of

the defendant in a certain cause pending in the Small Claims Court in and for Dade County, Florida The Firestone Tire & Rubber Co.

wherein an Ohio Corp. D/B/A Firestone Stores. the plaintiff

And you are hereby commanded to summon the said defendant Margarita Fuentes

to be and appear before said Court on the

at Y: et o'clock It M.

to answer the said plaintiff

SEP 3 0 1959 A. D. 19

SA FL. JUSTICE BLPG. 1351 N. W. 12th ST.

JUDGE PERRY. WITNESS, the HONORABLE JUDGES OF THE

in the premises. Division "C"

COURT, as also, EDWARD-B-AHLEER, Clerk, Dade County Small Claims Court, this the /5 day of

A. D. 19 69

Replevin Writ of 205376 Small Claims INDIVIDUAL SERVICE 3130 COURT

Firestone Stores ATTORNEY:

ADDRESS:

The Firestone Tire & Rubber Co. dba Firestone Stores DEFENDANTI Margarita Fuentes PLAINTIFF

DAY OF AND SERVED MARGARITA FUENTES A. D. 196. RECEIVED THIS WRIT ON THE September THE SAME ON.

THE WITHIN NAMED

5:00

TIME I DELIVERED TO THE WITHIN HAMED DEFEND-ANT A COPT OF PLAINTIFF'S INITIAL PLEADING AS FURNISHED BY THE PLAINTIFF, EXPLAINING THE .. IN DADE COUNTY, FLORIDA, BY DE-LIVERING TO THE WITHIN NAMED DEFENDANT A TRUE COPY OF THIS WRIT THE DATE AND HOUR OF SER-VICE ENDORSED THEREON BY ME, AND AT THE SAME DAY OF September CONTENTS THEREOF. DEFENDANT AT

. 5.00

69/11/6 Mac SHERIFFE, WILSON PURDY RW DADE COUNTY, PLORIDA

" Race

114 224

ORIGINAL RETURN 3130 ò

205375

Writ of

COURT Small Claims sivie Replevin

ATTORNEY: Firestone Stores 1200 W. Flagler St.

ADDRESS:

PLAINTIFF: The Firestone Tire & Rubber Co. dba Firestone Stores Defendant Margarita Fuentes

AND EXECUTED SAME IN DADE COUNTY, FLORIDA, ON September 15, A.D. 19 69 A.D. 19 69 RECEIVED THIS WRIT ON September 15

into my By replevying and taking into custody the Within described property to-wit:

SC207 Gas Range 1837WA Philco Stereo

SEP 19 1969

JATY FLA.

2 47 PH '69

OR RECORD

E. WILSON PURDY DADE COUNTY, FLORIDA

. 114.22-44

5

EXHIBIT F-1

EXHIBIT 5-

& RUBBER. THE FIRESTONE TIRE CO., an Ohio Corp. FIRESTONE STORES

MARGORITA FUENTES

Defendant.

at 9:00 FROM SEPTEMBER 30, 1969 ORDER OF CONTINUANCE

plaintiff, defendant, Upon application of the

IT IS ORDERED that the hearing and trial of this cause be and the same is hereby continued

December 15, 1969

p.m. 3:00 9

September

A.D. 1969

DONE AND ORDERED this

day of

30th

Judge PERRY

MORTON L.

:00 MP

Plaintiff Defendant's Attorney



EXHIBIT H

IN THE SMALL CLAIMS COURT IN AND FOR DADE COUNTY, FLORIDA

Case No. 205376

THE FIRESTONE TIRE & RUBBER Co., an Ohio Corporation, d/b/a FIRESTONE STORES, PLAINTIFF

28.

MARGARITA FUENTES, DEFENDANT

MOTION FOR CONTINUANCE

NOW COMES defendant, by and through her undersigned attorney, and moves this court for a continuance of the within cause, and shows unto this honorable court as follows:

1. Defendant has filed complaint #69-1359 Civ-WM in the Federal Court of the Southern District of Florida for a preliminary and permanent injunction against the continued enforcement in this case, and the future enforcement generally, of Chapter 78, §§ .08, .11, .12, .13, and the pertinent portions of § .01 on the grounds that said statutes are contrary to the Fourth and Fourteenth Amendments of the United States Constitution. A three-judge court is now being convened to hear this matter.

up the subject matter of this action.

3. Defendant submits that such action was unconstitutional and wishes the federal court to examine the constitutionality of this procedure in her case, and generally

The above-named sections were used by plaintiff in this cause to replevy the stove and stereo which make

for all other persons similarly situated.

4. Defendant submits that the statutory procedures set down for replevin in the State of Florida where property is taken prior to judgment; is analogous to the type of pre-judgment garnishment struck down by the Supreme Court of the United States in Sniadach v.

Family Finance Corporation of Bay View, et al., 23 L. Ed. 2d 349 (1969).

5. Defendant further submits that the proper forum for the adjudication of this statutory procedure alleged to be unconstitutional is the federal courts of the United States under 42 U.S.C. § 1983.

6. Defendant would therefore like a continuance of the within cause until such time as the federal court has an opportunity to rule on her allegations, and in this regard, promises, through her attorney, to prosecution said matter in federal court diligently and in good faith.

WHEREFORE, defendant moves this honorable court to grant a continuance in the within cause pending the outcome of the above named federal suit.

Respectfully submitted,

/s/ C. Michael Abbott
C. MICHAEL ABBOTT, ESQUIRE
E.O.P.I. LEGAL SERVICES
Attorney for Defendant
400 N.W. 5th Street
Miami, Florida 33128
Telephone 377-0917

EXHIBIT I

IN THE SMALL CLAIMS COURT IN AND FOR DADE COUNTY, FLORIDA

Case No. 205376

THE FIRESTONE TIRE & RUBBER Co., an Ohio Corporation, d/b/a FIRESTONE STORES, PLAINTIFF

vs.

MARGARITA FUENTES, DEFENDANT

ORDER OF CONTINUANCE

THIS CAUSE came on to be heard on defendant's Motion for Continuance, and the Court being fully advised in the premises, it is

ORDERED that said Motion be and the same is hereby granted, and this cause is continued pending further proceeding in the action filed by defendant known as Fuentes v. Faircloth, #69-1359 Civ-WM. (S.D. Fla.)

DONE AND ORDERED this 5 day of Dec., 1969.

/s/ Morton L. Perry Morton L. Perry Judge

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 69-1359-Civ-WM

[File Endorsement Omitted]

MARGARITA FUENTES, individually, and as a class for all those similarly situated, PLAINTIFFS

vs.

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

ORDER-May 4, 1970

Upon consideration, it is ORDERED:

(1) The motion of Firestone Tire and Rubber Company to dismiss the second amended complaint is denied.

(2) The motion of the Firestone Tire and Rubber Company to strike all references in the complaint with reference to the plaintiff representing a class is granted.

(3) The plaintiff's renewed motion for summary judgment is held in abeyance and this cause is set for the taking of testimony of the witnesses produced by both parties (and which is not covered by the stipulation of facts) on the 22nd day May, 1970, in the Central courtroom, Miami, Florida, at 2:00 P.M.

This 4 day of May, 1970.

- /s/ David W. Dyer Circuit Judge
- /s/ W. O. Mehrtens District Judge
- /s/ Joe Eaton District Judge

[SEAL]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

File No. 69-1359-Civ-WM

[File Endorsement Omitted]

MARGARITA FUENTES, individually, and as a class for all those similarly situated, PLAINTIFFS

-vs-

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

Answer of Defendant, Firestone Tire and Rubber Company, to Second Amended Complaint—Filed May 21, 1970

The Defendant, FIRESTONE TIRE AND RUBBER COMPANY, by its undersigned attorneys, for Answer to the Second Amended Complaint of the Plaintiff, says:

1. This Defendant denies each and every allegation contained in paragraphs Nos. 1 and 2 of the Second Amended Complaint.

2. This Defendant admits the allegations contained in paragraphs Nos. 3 and 4 of the Second Amended Com-

plaint.

3. Answering paragraph No. 5 of the Second Amended Complaint, this Defendant admits that it is a corporation duly organized and existing under the laws of the State of Ohio and qualified to transact business in the State of Florida and that it maintains a place of business, among other places in Florida, at 1200 West Flagler Street, Miami, Florida.

4. Answering paragraph No. 6 of the Second Amended Complaint, this Defendant admits the allegations contained therein, except that the stereo set purchased from this Defendant by the Plaintiff was purchased on or about

November 21, 1967, and not on or about December 21, 1967.

5. Answering paragraph No. 7 of the Second Amended Complaint, this Defendant admits that on or about September 15, 1969, it filed in the Small Claims Court of Dade County, Florida, a Statement of Claim, Affidavit in Replevin and a Replevin Bond, true copies of which are attached to and filed with the Stipulation of Facts executed between the parties to this cause on April 29, 1970 and heretofore filed in this cause on April 30, 1970, and that a Writ of Replevin, a true copy of which is attached to said Stipulation of Facts as Exhibit F and to the Plaintiffs' original Complaint as Exhibit B, was issued by the Clerk of said Court directed to all and singular the Sheriffs and Constables of the State of Florida commanding them to replevy the goods and chattels described therein, which Writ, together with aforesaid Statement of Claim, was duly and lawfully served by R. A. Williams, a Deputy Sheriff of Dade County, Florida, but this Defendant specifically denies all remaining allegations contained in paragraph No. 7 of the Second Amended Complaint.

6. Answering paragraph No. 8 of the Second Amended Complaint, this Defendant admits that the aforesaid Writ of Replevin was issued by the Clerk of the Small Claims Court for Dade County, Florida, without a prior hearing before that Court, and that a trial date was set in said Replevin action in said Court and has been continued pending further proceedings in this Court, but this Defendant specifically denies all remaining allegations contained in paragraph No. 8 of the Second Amend-

ed Complaint.

7. This Defendant specifically denies each and every allegation contained in paragraphs Nos. 9, 10 and 11 of

the Second Amended Complaint.

8. Answering paragraph No. 12 of the Second Amended Complaint, this Defendant admits that portions of Chapter 78 of the Florida Statutes are quoted and set forth therein, but specifically denies that the portions of said Chapter quoted therein are the "pertinent portions"

of the replevin statutes and would respectfully refer to the Court to all of the provisions of Chapter 78 of the Florida Statutes governing and pertaining to actions in replevin.

9. This Defendant specifically denies each and every allegation contained in paragraphs Nos. 13 and 14 of

the Second Amended Complaint.

10. Answering paragraph No. 15 of the Second Amended Complaint, this Defendant repeats and reavers each and every of its foregoing responses to the allegations contained in paragraphs Nos. 1 through 14 of the Second Amended Complaint as if fully set forth herein.

11. This Defendant specifically denies each and every allegation contained in paragraph No. 16 of the Second

Amended Complaint.

12. This Defendant specifically denies each and every allegation contained in the Second Amended Complaint not expressly admitted herein.

13. The Court lacks jurisdiction over the subject

matter of this action.

14. This Defendant affirmatively avers and alleges that the Plaintiff has no standing or right to bring this action and to attack the constitutionality of any of the provisions of Chapter 78 of the Florida Statutes in that she did freely and voluntarily consent to the entry into her home by the aforesaid R. A. Williams, Deputy Sheriff of Dade County, Florida, and the replevying by him, pursuant to the aforesaid Writ of Replevin, of the gas stove and stereo which the Plaintiff had purchased from this Defendant under and pursuant to the contracts entered into by and between the Plaintiff and this Defendant, true copies of which are attached to the aforesaid Stipulation of Facts as Exhibits A and B and to the Plaintiffs' original Complaint as Exhibit A.

15. This Defendant affirmatively avers and alleges that under and pursuant to the provisions of the contracts entered into by and between the Plaintiff and this Defendant, true copies of which are attached to the aforesaid Stipulation of Facts as Exhibits A and B and to the Plaintiffs' original Complaint as Exhibit A, the title to the articles described therein and the right of posses-

sion thereto remained in this Defendant until all payments required thereunder had been made by the Plaintiff to this Defendant and in the event of default in any payment required thereunder to be made by the Plaintiff to this Defendant, this Defendant had the right and option to take back the articles described therein: that the Plaintiff did fail to make unto this Defendant the payments required therein to be made by her to this Defendant, and upon such failure, this Defendant exercised its right to take back the articles described therein and did, by the aforesaid replevin action, cause the articles described therein to be repossessed and replevied under and pursuant to the provisions of Chapter 78. Florida Statutes, by the filing of the aforesaid replevin action in the Small Claims Court for Dade County, Florida, and the Plaintiff did, as a prerequisite to the issuance and service of the aforesaid Writ of Replevin therein, file with the Clerk of the Small Claims Court for Dade County, Florida, a Replevin Bond, true copy of which is attached to the aforesaid Stipulation of Facts as Exhibit E, in an amount and containing conditions which fully complied with the provisions of Section 78.07. Florda Statutes; and that the provisions of Chapter 78, Florida Statutes, are neither on their face or as applied to the Plaintiff under the facts giving rise to this action in violation of the Fourth or Fourteenth Amendment of the United States Constitution or any other provision of the United States Constitution.

WHEREFORE, the Defendant, FIRESTONE TIRE AND RUBBER COMPANY, demands judgment in its favor and against the Plaintiff and that the Plaintiff's Second Amended Complaint be dismissed with prejudice to and at the cost of the Plaintiff.

MERSHON, SAWYER, JOHNSTON,
DUNWODY & COLE
Attorneys for Defendant, Firestone
Tire and Rubber Company
1600 First National Bank Building
Miami, Florida 33131

By /s/ George W. Wright, Jr.

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 69-1359-Civ-WM

MARGARITA FUENTES, individually, and as a class for all those similarly situated, PLAINTIFF

-vs-

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

AFFIDAVIT OF VINCENT G. MORGAN IN OPPOSITION TO RENEWED MOTION FOR SUMMARY JUDGMENT—Filed June 1, 1970

VINCENT G. MORGAN, being duly sworn, deposes and says:

That I am fifty-eight years of age, a resident of Akron, Ohio, and have been employed twenty-seven (27) years by The Firestone Tire & Rubber Company, My present title is Manager of Retail Credit. In this capacity, I am directly responsible for the formulation of retail credit policy, and the administration of Firestone's fifty (50) regional district Credit Managers and credit personnel in some 1064 Firestone Retail Stores. My staff is further responsible for the provision of information, consultation services, and model procedures for credit transactions to some 50,000 Firestone dealers throughout the United States. I am incumbent President of Merchants Research Council, Inc., Chicago, Illinois, a national organization engaged in the study and research of consumer credit affairs and the recommendation of national and state consumer credit legislation.

This affidavit is made in opposition to the plaintiff's Renewed Motion for two reasons: The first is that the granting of this Motion would create a serious imbalance

between the legitimate rights of retailers and those of purchasers. It must be borne in mind that the transaction under consideration is entered into entirely voluntarily by the purchaser. In such transaction, the title and ownership of the property is in the retailer until full payment therefor is made, while the right to possession and use of the property is in the purchaser, provided the required payments are timely made. The State of Florida, as is the case in most states, is extremely zealous in its prevention of misuse of its extraordinary remedies. For this reason, the retailer must exercise the utmost precaution in proceeding to repossess his property as he is subject not only to forfeiting on his bond, but is also subject to the sanction of compensatory and even punitive damages if he exceeds the strictly defined remedy in the slightest degree. By contrast, if repossession by replevin writ before judgment be not permitted, no assurance, by bond or otherwise, would be provided against the wear or misuse of the property pending a hearing on the repossession. To require the retailer to forgo his right to repossession of his property in time to salvage any value thereof, would create an obvious imbalance in the rights and equity of the parties.

Secondly, I believe that an adverse decision of this Court would have serious socio-economic implications affecting (1) The retailer; (2) the consumer; and (3) the economy and national well-being. Retailer's Viewpoint: Considered from the retailer's viewpoint, an estimated seventy percent (70%) of all retail sales of durable goods are credit transactions. While there is some variation in this figure among different categories of retail goods, the figure tends to hold constant across the spectrum of large, medium, or small retailers. With this percentage of total sales involved, it becomes obvious that a sound credit structure, which necessarily includes adequate creditor remedies, is essential to the continued viability of both large and small business retailers.

In Florida, as in a majority of states, the legitimate retailer must extend retail credit within a rate ceiling which is usually established by state statutes at one and one-half percent $(1\frac{1}{2}\%)$ per month, or eighteen percent

(18%) per annum. This figure is not overly adequate when it is appreciated, that the retailer's "cost" of the credit transaction must consider and include the availability and cost of short or long term wholesale money (approximately 11.8%) representing his investment in carrying the merchandise for the period of the deferred payment; the fixed cost of a credit investigation: the expense of printing of forms; monthly mailing expenses; computer or clerical expense; the costs of recruiting and training a field credit staff and the salaries or wages to maintain such a staff in the field; advertising and promotional expenses of retail credit; other incidental expenses such as telephone, telegraph, travel, etc.; legal fees and other collection expenses; "bad debt" write-offs and losses on resale of repossessed merchandise; necessary membership fees in national and state associations which provide credit information (e.g., local rates, income trends, pending legislation, etc.); vulnerability to catastrophic losses due to floods, conflagration, prolonged labor strikes, or other local disasters; a proportionate allocation of fixed overhead expenses; comparative return on credit sales versus return on income or growth securities, and other competing demands on available corporate capital. Depending on their ability to manage these costs, many retailers operate at or below their fixed cost of the credit transaction.

While it is accepted that repossession of consumer goods will almost invariably result in loss to the retailer, critical to the retailer is the necessity of controlling the amount or percentage of such losses within limits which will permit him to continue to make credit sales, which, in our present economy, can be tantamount to continuation in the retail business. Under our present credit system there are four principal factors which control or limit the percentage of loss on repossessed merchandise:

(a) Probably the most important factor is that in the vast majority of cases of default, the debtor will voluntarily return or surrender the merchandise. The inducement for this voluntary return is the debtor's appreciation that the creditor has the legal right to recapture

the goods promptly in any event, supported by his desire to avoid legal expense, and, in some cases, loss of credit

rating.

(b) The next most important fact is that under our present credit system the creditor has an effective means of recovering the goods and liquidating the indebtedness in some approximate relation to the rate at which the collateral depreciates. Stated in other words, in a percentage of credit sales, which is particularly high among low income "high risk" credit purchasers, the retailer must look solely to his goods now in possession of the purchaser as security for payment of their price. In the event of repossession, these goods must be sold in what is at best a thin market due to the strong consumer preference for newness per se, technological improvement resulting in rapid obsolescence of the goods, normal wear and tear of the goods in the hands of the purchaser, abused goods or the suspicion that the goods may have been misused, rendering their fitness questionable, loss of new goods warranties, etc. As this market diminishes in inverse ratio to the increased age and worn condition of the goods, in the event of a default, and after recognition that repossession is the only course available, it is imperative that repossession not be delayed in order that the salvage value of the goods can be realized and applied to the indebtedness.

(c) The third factor limiting the retailer's rate of loss is that the money realized by resale of the repossessed goods can be reinvested in income producing goods, there-

by offsetting a portion of the remaining loss.

(d) The fourth factor which controls the rate of loss on repossessed goods is the fact that, whether voluntarily returned or recovered by the use of summary process, the goods can be recaptured without expenditure of substantial legal fees and court costs, which, in some cases, exceed the retail cost of the goods, and are never entirely recoverable even after judgment.

It can be seen that each of the above factors depends upon the retailer's remedy of summary repossession. Were the remedy lost, the defaulting debtor would be sheltered by the law while utilizing the entire serviceable life of the product which has not been paid for. For this reason, and the fact that it would soon be commonly appreciated that in many cases the retailer's legal expenses exceeded the value of the debtor's obligation, there would be little inducement to surrender or return the goods voluntarily. This, in turn, would result in an appreciably higher percentage of defaults. In such defaults, were a trial required in each case before repossession, it is obvious that the retailer could salvage no part of his loss due to the protracted court calendars in this Country, or recoup any loss through reinvestment.

To the retailer carrying his own accounts, losses would be fixed at the value of the goods plus his expenses of having made the credit transaction. However, to the retailer with insufficient volume to carry his own accounts, or who is in need of a more rapid cash flow, and must, therefore, discount his paper, it is foreseeable that the bank or other purchasing financial institution will severely increase the rate of discount, thereby diminishing or eliminating profit on the sale itself, or will, in the minimum, insist on the retailer endorse his paper. If the paper is endorsed by the retailer, in addition to his other losses on the transaction, he will also be liable to the lending institution for the retail credit charge.

Similar endorsement would undoubtedly be required by banks on three-party credit card transactions, which are

increasingly used in retail credit selling.

The implication of loss of this remedy to wholesale financing must also be considered. Many retailers rely almost exclusively on suppliers' financing in the form of consignment or other floor plans to provide their entire retail inventories. It should be appreciated that many of these inventory financings involve substantial sums of money, which are secured by the inventory and accounts receivable generated therefrom. Were there interposed any substantial delay to the supplier's right to prompt repossession of inventory in possession of the retailer, or dilution of the value of the generated receivables due to a delay in their enforcement, no supplier could afford to continue inventory financing of marginal retailers.

The serious consequences of loss of the remedy of summary repossession to all retailers is obvious. The marginal retailer who must rely upon supplying inventory financing could not continue in business. Also, the retailer, operating under our present credit system at or below his cost of credit sales, if confronted by an increased rate of loss from repossession, must either increase his prices to a noncompetitive level, or restrict his extension of retail credit, thereby curtailing his sales volume. The inevitable result of either choice is to accelerate business failure. This would be particularly true with respect to hundreds of thousands of retailers operating with a small volume of "large balance" accounts (which can absorb the fixed cost of credit and justify the legal expense of collection), proportionate to a large volume of "small balance" accounts which cannot absorb fixed credit costs or justify the legal expense of their collection.

The net result of the above is that the many small or marginal retailers could not afford to continue in the retailing business, while larger more soundly financed retailers will unquestionably pass this burden onto the

purchaser.

Consumer's Viewpoint: Anyone who has seriously thought through the economic implications of this case would appreciate that continuance of the remedy of summary repossession is advantageous to all consumers, and absolutely essential to consumers such as the named

plaintiff in this case.

As one person in position to determine the reaction of business to loss of the remedy under consideration, it is my judgment that large proprietary retailers will continue to engage in the extension of retail credit, but will confine their credit sales to high or middle income consumers with demonstrated credit ratings. While perhaps smaller retailers will be competitively forced to accept somewhat more marginal credit risks; clearly, the low income consumer, who is most in need of retail credit would not find such credit readily available at lawful rates. As this class of consumer cannot easily convert, or in some cases ever adjust, to a cash economy, they

will be forced to look to the small loan company with national rates approximating thirty-six percent (36%) per annum. Failing to qualify for, or exceeding the limits of, credit approval from that source, this class of consumer would be forced to borrow from "loansharks" who illegally loan at rates as high as 500% of the obligation, or be forced to trade with low-income market retailers, or "Ghetto Merchants", at grossly inflated prices which are sometimes in excess of 150% of current

market prices.

While occasioned by a different cause, the "Arkansas experience" demonstrates the above eventuality. In that State, a flat constitutional prohibition of any type of financing charge, either in sale or loan credit, in excess of 10% per annum, was applied by the Supreme Court of Arkansas to upset the long honored "time-price" doctrine in retail credit sales. As documented by the University of Arkansas, almost immediately after that decision all legitimate loan companies vacated the State, retailers increased their prices substantially over their prices in all neighboring states (adversely affecting traditionally cash as well as credit customers), and illegal loansharks moved in number into the State and seized complete hold on the low income consumers' credit needs. See Lynch, Consumer Credit at Ten Per Cent Simple: The Arkansas Case: Vol. 1968 No. 4, University of Illinois Law Forum, pp. 544-620; Board of Student Advisors: An Empirical Study of the Arkansas Usury Laws.

For illustration of the abuses of forcing low income or other high risk consumers to trade with "Ghetto Merchants", see the Federal Trade Commission's March, 1968 Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers.

A fallacious impression which should be corrected is that business can or will absorb this additional cost in its existing profit margins. Many industries (such as the tire industry which has had an historical profit level of $3\frac{1}{2}\%$) simply cannot absorb this cost in their present profit margins. With respect to other industries, it is axiomatic that the motive of maximizing profits is im-

plicit in an entrepreneur economy, which is epitomized by retailing. Such industries, already caught between increased material, money and labor costs and a quiescence in retail purchasing, will not absorb this cost, but will pass it on to the consumer in the form of increased prices in consumer durables. The basic economics involved predetermines this result.

Another consumer disadvantage is the fact that insofar as it is necessary to absorb additional credit costs into inflated prices, the consumer will not know the true cost of credit in frustration of the entire purpose of the

Federal "Truth in Lending" Act.

It should also be recognized that in the case of some low and middle income consumers, the installment credit purchase is the only form of saving, albeit enforced, used by such consumers. Their entire assets are acquired in this manner, and the mortgage of these assets their only means of borrowing money in emergencies. If retail credit is no longer available to such consumers, it is unlikely that this type of consumer will establish any net worth; and, even if a net worth were established, it is improbable that any lending institution will loan against such security without this remedy available.

Also, under our present system the consumer is advantaged by timely repossession which reduces the extent of his indebtedness. Insofar as credit risks would be assumed without this remedy, it would be my judgment that if the obligation were defaulted on, retailers, lacking other remedy, will be forced to pursue their legal remedy for judgment on the obligation, which would mean a material appreciation of expense to the defaulting debtor who will ultimately pay the full obligation, in-

terest, and court costs.

Moreover, under our present system, it is possible for consumers who have defaulted on a retail obligation in the past to reestablish themselves as acceptable credit risks, due, in large part, to the availability of the remedy under discussion. Necessarily, therefore, without this remedy, controlling emphasis must be placed upon prior credit performance. In most cases, this fact will preclude reestablishment of credit. To a limited extent,

this alternative can be foreseen by comparing the low rate of credit application rejection in Illinois, which has adequate creditor remedies, with the substantially higher rate of credit application rejection in Texas which has

inadequate creditor remedies.

Finally, we are not so callous as to ignore the fact that in small towns and rural areas throughout the United States, there are many low income consumers or pensioners who cannot afford automobiles, elderly people, people with physical disabilities or who for other reason must deal exclusively with nearby local retail merchants. As such retail operations are more often than not marginal, and, therefore, the most likely to fail, an improvident decision in this case could impose a very serious physical inconvenience on the class of purchasers mentioned.

The only alternative to the above consequences would be to increase maximum permissible retail credit rates. While this may appear superficially fair in that it places the increased costs on the credit purchaser as opposed to the cash purchaser, it must be considered that it would penalize the prompt paying credit buyer with a higher credit rate than his credit risk warrants. In any event, it is doubtful that any such legislation will be enacted in the foreseeable future.

National Effects: As evidenced by recent events, credit availability is delicately and responsively interrelated with virtually every facet of our economy. To disturb the balance of the existing credit structure can have immediately amplified repercussions on employment, production, stock prices, inflation, welfare, and, indeed, our entire standard of living. While it is, of course, impossible to foresee every consequence of disturbing so sensitive a mechanism as retail credit, it is my judgment that, in the least, the following aspects of our economy would be influenced: (a) Retailing in this Country would be forced, not into a cash economy, but into what could be an unreasonably restricted credit economy, which would result in an appreciable increase in the failure rate of small and marginal retailers; (b) A portion of the sales

of failed retail businesses would presumably be absorbed by larger retailers, adding to further economic concentration, which is not favored in our current antitrust philosophy; (c) There would be an increase in retail prices of consumer durables, which would contribute to our already serious inflationary spiral; (d) There would be a marked increase in "loansharkism" and other illegal credit practices: (e) Ghetto marketing's gross profits are 71% higher than proprietory retailers, which makes it an impressively profitable business. The expansion of this form of marketing would be encouraged by loss of the remedy under consideration to proprietory retailers; (f) There could be an increase in the number of collection cases which would add to court congestion; (g) The purpose of a major piece of consumer legislation, the Federal Truth in Lending Act, would be frustrated; and (h) The quantity of retail credit at lawful rates available to families with incomes under \$4,000.00 will be The standard of living of families with incomes in the range of \$5,000.00 to \$12,000.00 would be unavoidably lowered. Indeed, due to the improvident saving habits of many consumers in this income bracket, they could be denied what may be regarded as essentials such as automobiles used to get to and from work, furniture for their families, etc., as well as work-saving and luxury appliances. By way of illustration, in the United States, there is one automobile for every 2.9 persons, in contrast with one automobile for every 369.4 persons in Russia, where retail credit is not general available.

Viewed in a broader contrast, this Country's prosperity is based upon our relatively lower cost of food which has a larger portion of our income for the purchase of durables; mass production resulting a lower per unit cost, and the availability of retail credit which supports the market into which these goods are sold. A restriction in the availability of retail credit will slow the growth rate of sales of consumer durables. While only a percentage of this loss need be permanent, there will be an immediate more sizeable loss in retail sales during the period of conversion to the more restricted credit

economy, or, in the case of the low income consumer. conversion to a cash economy. This loss will occur in the context of an already severe quiescence in our economy, and could have disproportionate by amplified effect on production decreases and over-inventory situations in basic manufacturing. In this respect, it should be appreciated that the availability of retail credit is not only an important, but in the opinion of some reliable economists, determinative factor in schedule mass production. In convincing support of their position, these economists cite Japan's emergence as the second largest auto manufacturer in the world as due not to her labor advantage. but due to her broad adoption of retail credit. Whatever the merit of this example, it would be dangerous to refuse to recognize that the relationship between available retail credit and scheduled mass production is sufficiently direct that our economy will be materially slowed by any factor undermining the availability of retail credit. With every slowing of the economy there is a concommitant increase in unemployment. As unemployment invariably proceeds from hourly workers, to low-paid clerical help, and then to middle income satellite skills, the effect of any slowing of our economy is most felt by the low-income consumer most in need of credit. The cyclic effect is obvious.

To recapitulate, the granting of this Motion would flout very settled law, and is unnecessary to effect any justice in the premises. It would, moreover, create a serious imbalance between the rights and equities of reretailers and those of purchasers. In addition, considered as a matter of economic reality, it would result in placing small and marginal retailers in serious jeopardy. It would result in still more serious injury to purchasers, particularly the lower income purchaser most in need of retail credit. It could not help but harm our economy,

standard of living and national well-being.

/s/ Vincent G. Morgan VINCENT G. MORGAN SWORN TO AND SUBSCRIBED before me this 1st day of June, 1970 at Miami, Dade County, Florida.

/s/ Dolores Smothers Notary Public, State of Florida at Large

My Commission Expires:

Notary Public, State of Florida at Large My Commission expires Mar. 8, 1971 Bonded by Transamerica Insurance Co.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 69-1359-Civ-WM

[File Endorsement Omitted]

MARGARITA FUENTES, individually, and as a class for all those similarly situated, PLAINTIFFS

vs.

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

OPINION-August 21, 1970

Before DYER, Circuit Judge, and MEHRTENS and EATON, District Judges.

DYER, Circuit Judge:

Plaintiff brought this suit against Firestone Tire and Rubber Company (Firestone) and the Attorney General of Florida¹ for declaratory and injunctive relief against continued enforcement of certain sections of Florida's replevin statute, F.S. § 78.01, et seq., alleging that they are unconstitutional in that they authorize a taking of property without prior opportunity to be heard in contravention of the Due Process Clause of the Fourteenth Amendment and they authorize a search and seizure without the necessity of a search warrant in violation of the Fourth Amendment. Jurisdiction is founded on 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343(3). A three judge court was convened. Testimony has been heard by the Court and a stipulation of facts and briefs have been

Also named as defendants were the sheriff and deputy sheriff of Dade County, who were charged with the responsibility of executing the writ of replevin upon which the instant controversy centers. This Court previously granted a motion to dismiss them as defendants.

filed. Plaintiff has moved for summary judgment. Having considered all the evidence and arguments the Court denies plaintiff's motion for summary judgment and, deciding the case on the basis of the record before it, enters

judgment for the defendants.

In June, 1967, plaintiff purchased from defendant Firestone a gas stove. In November, 1967, she purchased a stereo set from Firestone. Both purchases were made under conditional sales contracts which provided in part that "in the event of default of any payment or payments, Seller at its option may take back the merchandise". On September 15, 1969, several months after plaintiff had fallen behind in her payments in the total sum of \$204.05 and had received notice to pay or return the merchandise, Firestone, pursuant to the procedure authorized in the statutes now under attack, submitted a complaint and affidavit in replevin in the Small Claims Court of Dade County, Florida, and posted a replevin bond. The Small Claims Court issued a writ of replevin immediately which was executed without prior notice to plaintiff by a deputy sheriff on September 15.

The facts surrounding the actual execution, taken most favorably to plaintiff, show that the deputy sheriff had a communications problem with plaintiff since she spoke little or no English. Gradually, however, he was able to communicate his purpose and the effect of the writ. At this point, plaintiff's daughter-in-law, who lived in the same house with plaintiff, became "upset and emotional" and protested the repossession. She sent for Mr. Leon, the plaintiff's son-in-law, to assist her and the deputy agreed to wait. When Mr. Leon arrived he explained to the deputy in English that his attorney had advised him that a court proceeding was necessary before the merchandise could be repossessed and that, on his advice, he was not going to give up the property. The deputy "explained the effect of the writ to Mr. Leon, that he was obliged to repossess the stove and stereo in

² Further proceedings in the Small Claims Court have been stayed pending the outcome of this federal suit.

accordance with its terms." 3 Mr. Leon then agreed to the repossession and let the deputy, who until then had been standing outside on the front porch, and the two men from Firestone, who had been waiting outside in their truck until this time, into the house and showed them where the merchandise was located.

Shortly thereafter plaintiff filed the instant action. Although she admits delinquency in the payments she alleges that she has a meritorious defense to the repossession—apparently that the stove was mechanically defective and that Firestone has failed to make satisfactory

repairs.

The specific sections of the Florida replevin statute which plaintiff attacks are F.S. §§ 78.01, 78.08, 78.10, 78.11 and 78.12.4 Under these sections a person whose goods are wrongfully detained may, by posting a bond in twice the amount of the value of the property, have a writ of replevin to recover them (78.01, 78.04 and 78.07). The writ commands the executing officer to replevy the goods and to summon the defendant to answer the complaint (78.08). In executing the writ the officer shall publicly demand delivery of property secreted or concealed in any dwelling house or other building and if it is not then delivered he shall cause the building to be broken open and, if necessary, he shall take to his assistance the power of the county (78.10).

Relying primarily on Sniadach v. Family Finance Corporation, 1969, 395 U.S. 337, which held that Due Process requires a prior hearing before wages may be garnished, and Goldberg v. Kelly, 1970, —— U.S. —— [No. 62, March 23, 1970], which held that due process requires a prior evidentiary hearing before a State may terminate welfare payments, plaintiff contends that the Fourteenth Amendment prohibits a conditional seller from repossessing property without giving the vendee

³ Quoting from the stipulation of facts.

⁴ F.S. §§ 78.11 and 78.12 are not really in issue here as they provide for replevin of property which has changed possession or has been removed from the jurisdiction of the court. Neither situation is involved here. Section 78.10 is not in issue either as will be seen later in this opinion.

the benefit of a prior hearing. We find neither case applicable to the replevin situation under scrutiny here.

The Tenth Circuit was recently faced with a similar Due Process objection to the Oklahoma replevin statute in Brunswick Corporation v. J & P. Inc., 10 Cir. 1970. 424 F.2d 100. Brunswick had sold bowling equipment to a bowling alley under a conditional sales contract. When the purchaser defaulted in payments Brunswick filed an affidavit for replevin and a replevin bond. The United States Marshal took possession of the equipment in the bowling alley building by rendering it inoperative by removing some essential parts. He then made constructive delivery to Brunswick who advertised the equipment for sale and sold it at public auction, after execution of the writ but before judgment was obtained in the replevin action. The Tenth Circuit rejected the Due Process attack on Oklahoma's replevin statute and we are in complete agreement with its reasoning:

[W]e find no merit in appellants' additional contention that under the recent Supreme Court case of Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) they have been the victims of a taking of property without the procedural due process required by the Fourteenth Amendment. Sniadach expressly was a unique case involving, "a specialized type of property presenting distinct problems in our economic system." That case involved wage garnishment without notice or hearing prior to judgment on a promissory note. It is not in the least comparable to the case here on appeal involving enforcement of a security interest. Appellants have contractually agreed that, upon default, their creditor Brunswick "* * may take immediate possession of said property [collateral] [in the event of default]." Appellants admit that they were in default on the conditional sale, so they cannot now be heard to object to the default procedures they agreed to simply because Brunswick did utilize the legal process of replevin under bond." Id. at 105.

Plaintiff attempts to distinguish Brunswick on the ground that there two commercial parties had executed the conditional sales contract while in the instant case a commercial party and a private individual have contracted together. This is a distinction without a difference as far as Due Process is concerned. Plaintiff also attempts to distinguish Brunswick on the ground that the buyer there admitted "default" on the conditional sale. Plaintiff contends that "default" is a technical term which goes beyond plaintiff's admission in this case of delinquency in payments. Plaintiff argues that if there has been a breach of contract by the seller (which she maintains there is) she cannot be in "default" for failure to make payments. Even assuming (without deciding) that this would ordinarily be so under state law, the contract between plaintiff and Firestone does not give Firestone the right to repossess in the event of mere "default": it gives Firestone that right in the event of "default of any payment or payments". (Emphasis supplied). The contract thus defines "default" in terms of the seller's remedies if the buyer was behind in payments and plaintiff admitted delinquency in her payments.

Nor do we think that Goldberg v. Kelly, supra, (which had not yet been decided on the date of the Brunswick decision) is of any assistance to plaintiff. Again, a special type of property was involved—welfare payments

by the State:

"Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it."

Id. at p. 6 of slip opinion (quoting three-judge district court opinion). The hardships facing the welfare recipient, like those facing one whose wages are garnished, are not present in the instant situation where goods purchased are replevied. Furthermore, the welfare situation is not at all comparable to a private contract providing for enforcement of a security interest.

In sum, we think that despite Sniadach and Kelly there are still situations in which prejudgment seizure

of goods without a prior hhearing is valid, see Sniadach at 340, and that replevin pursuant to a contract which authorizes a conditional seeller to repossess in order to protect his security interesst in the goods which are the subject of the contract is one of those situations.

We also think the conditional sales contract in the instant case is dispositive of the Fourth Amendment question. We disagree witth plaintiff's contention that the broader implications of cases like Camara v. Municipal Court, 1967, 387 U.S. 5523, 87 S.Ct. 1727, 18 L.Ed.2d 930, and See v. City of Secattle, 1967, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 9443 (both holding the Fourth Amendment search and seizizure provisions applicable to administrative inspections) vitiate the vitality of Murray's Lessee v. Hoboken ILand and Improvement Co., 1856, 59 U.S. 272, 285, 155 L.Ed. 372, which said that the Fourth Amendment "haas no reference to civil proceedings for the recovery off debts". But even assuming arguendo that the Fourth Almendment search and seizure provisions would otherwise aapply to the issuance of summary civil process to satisfy a debt as contended by plaintiff, the essence of the contract in issue here is that one party may enter the preemises of the other (whether by himself or through an offficer who is executing a writ of replevin) in order to reppossess property in which he has an interest. It may be that a forcible entry under these circumstances, pursuannt to F.S. § 78.10, would not be legal or constitutional. BBut that is not this case and we do not decide this questition.

This case involves a pereaceable entry. Admittedly, plaintiff was reluctant to all low the entry. However, this fact does not change the clcharacter of the entry from peaceable to forced. Mr. Leon, who was speaking for the plaintiff, allowed the depouty to enter plaintiff's house to repossess the goods afterer the deputy explained the effect of the writ to him. Thus, the issue really boils down to this: Whether, abssent authorization to break down the door or otherwise enter forcibly, the Fourth Amendment prohibits partieses to a conditional sales contract from contracting for peaceable repossession. We think the answer is obviously an emphatic no. The Fourth Amendment does not prevent private parties

from contracting, as the plaintiff here did, that one may

peaceably enter the other's house.

Plaintiff has cited to the Court many cases relative to both her Due Process and Fourth Amendment claims. Many of them are state cases which hold that Sniadach goes beyond wage garnishment to garnishment of any funds and that the presence of a bonding requirement (which was absent in Sniadach) before prejudgment garnishment is allowed is not a substitute for a prior hearing. We do not think any of these cases affect the result we reach on the Due Process issue because none deal with the enforcement of a security interest pursuant to a contract provision authorizing it. Blair v. Pitchess, No. 942, 966 Cal Super. Ct., May 12, 1969 (final order entered November 25, 1969) did hold California's claim and delivery law unconstitutional on both Due Process and Fourth Amendment grounds. No authority was cited in that case, however, and, to the extent that Blair may be read as conflicting with our decision today, we disagree with it.

We hold that the Florida replevin statute, F.S. § 78.01 et seq., to the extent that its provisions were before the Court by virtue of an actual controversy in this case, is constitutional. The declaratory and injunctive relief sought by the plaintiff is denied and judgment will be

entered for the defendants.

EATON, J. (dissenting).

I respectfully dissent. I believe the question of the constitutionality of F.S. § 78.10 is before the Court and that the pre-judgment replevin procedure established by F.S. §§ 78.01, 78.04, 78.07, 78.08 and 78.10 lacks the essential elements of due process.

When the state authorizes the forcible entry of a person's house prior to the establishment of the probable validity of a creditor's claim, it contravenes the Due

Process Clause of the Fourteenth Amendment.

Further, when one signs a contract which includes the words "in the event of default of any payment or payments, seller at its option may take back the merchandise," he does not waive his Fourteenth Amendment right to "due process of law."

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 69-1359-Civ-WM

(Three Judge Federal Panel)

[File Endorsement Omitted]

MARGARITA FUENTES, individually, and as a class for all those similarly situated, PLAINTIFF

--- 228---

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

FINAL JUDGMENT FOR DEFENDANTS-September 9, 1970

The Court having considered the pleadings, exhibits and affidavits on file in the above entitled cause and the facts stipulated to between the parties as contained in the stipulation of facts between them bearing date April 29, 1970 and filed in the above entitled cause on April 30, 1970 and the testimony, evidence and exhibits adduced before the Court at the evidentiary hearing held on May 22, 1970, as well as the brief submitted and filed by Plaintiff, Defendants and amici curiae, through their respective counsel, and the Court having filed its opinion in the above entitled cause on August 21, 1970, wherein the Court denied Plaintiff's motion for summary judgment and directed that judgment be entered for the Defendants, it is, thereupon,

CONSIDERED, ORDERED AND ADJUDGED as follows:

1. Plaintiff's motion for summary judgment be and the same is hereby denied.

2. Final judgment be and the same is hereby entered for and in favor of the Defendants and against the Plaintiff, and the Plaintiff shall take nothing by this action and the Defendants shall go hence without day and shall recover of and from the Plaintiff their costs, if any, expended herein, which shall be taxed by further order of the Court upon motion of the Defendants.

DONE AND ORDERED at Miami, Dade County, Florida, this 8th day of September, 1970.

- /s/ David W. Dyer DAVID W. DYER Circuit Judge
- /s/ W. O. Mehrtens
 WILLIAM O. MEHRTENS
 United States District Judge
- /s/ Joe Eaton
 Joe Eaton
 United States District Judge

[SEAL]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 69-1359-Civ-WM [File Endorsement Omitted]

MARGARITA FUENTES, individually, and as a class for all those similarly situated, PLAINTIFF

-v-

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that MARGARITA FUENTES, plaintiff, hereby appeals to the Supreme Court of the United States from the final order denying plaintiff's motion for summary judgment and entering final judgment in favor of the defendants and against plaintiff, entered in this action on September 8, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted.

BRUCE S. ROGOW
DONALD C. PETERS
RENE V. MURAI
Legal Services Program, Inc.
3600 Grand Avenue
Coconut Grove, Florida
305—446-5931

C. MICHAEL ABBOTT 2837 Pittsfield Boulevard Ann Arbor, Michigan 48104 313—971-0437

By: /s/ C. Michael Abott C. MICHAEL ABBOTT

SUPREME COURT OF THE UNITED STATES

No. 6060, October Term, 1970

MARGARITA FUENTES, ET AL., APPELLANTS

v.

EARL FAIRCLOTH, Attorney General of Florida, ET AL.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

February 22, 1971

SUPREME COURT OF THE UNITED STATES

No. 6060, October Term, 1970

MARGARITA FUENTES, ET AL., APPELLANTS

27.

EARL FAIRCLOTH, Attorney General of Florida, ET AL.

APPEAL from the United States District Court for the Southern District of Florida.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 22, 1971

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 69-1359-Civ-WM

[File Endorsement Omitted]

MARGARITA FUENTES, individually, and as a class for all those similarly situated, PLAINTIFF

-vs-

EARL FAIRCLOTH, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY, DEFENDANTS

The Central Court Room, United States District Court, 300 Northeast First Avenue, Miami, Florida. Friday, May 22, 1970.

The above-entitled matter came on for hearing, pursuant to Notice and Special Appointment, commencing at 2:00 o'clock p.m.

BEFORE:

HON. DAVID W. DYER, Judge of the United States Court of Appeals for the Fifth Circuit; HON. W. O. MEHRTENS and HON. JOE EATON, United States District Judges.

[fol. 2]

APPEARANCES:

LEGAL SERVICES PROGRAM, INC., By: C. MICHAEL ABBOTT and DONALD C. PETERS, ESQS., On behalf of the Plaintiff.

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE, ESQS.,
By: GEORGE W. WRIGHT, Jr., ESQ., On behalf of the Defendant Firestone Tire &

Rubber Company.

[fol. 3] JUDGE MEHRTENS: Gentlemen, I want to make an announcement. I have not discussed this with Judge Dyer nor with Judge Eaton. But so that everybody will know the situation, five years ago I was a Senior Partner in the firm of Mershon, Johnston, Simmons, Dunwody, Mehrtens & Cole. I have had no connection with them since I have been on the Bench, and I have no financial interest in the firm.

Nevertheless, Firestone Tire & Rubber Company has been a client of that firm for many years; and at times I did represent them in litigation. They, as you all know, were permitted to intervene in this action after it was

filed.

If anyone has any objection to my sitting, I will be glad to hear from anybody who feels that I can't hear and decide this case fairly and impartially.

JUDGE DYER: Mr. Abbott?

MR. ABBOTT: The Plaintiffs have no objection to Judge Mehrtens sitting.

JUDGE DYER: The Attorney General's Office?

MR. TURNBULL: Sir, we do not object to you sitting on the Court. We do object to the jurisdiction of [fol. 4] the Court. And I will make a Motion at a later time. But as far as you are concerned, sir, we have no objection at all.

JUDGE DYER: Your subsequent Motion as to jurisdiction is not based upon any incapacity of Judge Mehr-

tens, is it?

MR. TURNBULL: It will never be based on the incapacity of Judge Mehrtens.

JUDGE DYER: Mr. Wright?

MR. WRIGHT: No objection, Your Honor.

JUDGE DYER: Is there any other party in interest that would like to either object or make a statement for the record or an observation as to the effect of Judge Mehrtens sitting in this case?

(No response)

THE COURT: All right. Thank you.

We are ready to proceed in this case to take the testimony of witnesses who may be produced by either party on matters which are not covered by the Stipulation of Facts.

MR. ABBOTT: If The Court please, the Plaintiffs are ready. We are Michael Abbott and Donald Peters for the Plaintiffs. We are prepared to call three witnesses this afternoon, on two of which we will use the services of the [fol. 5] interpreter, Mr. Seligman of Associated Interpreters, Inc.

Before we proceed, Your Honors, I would like some in-

struction from The Court.

It is the Plaintiff's position—and I understand it is also the position of Firestone—that any testimony other than that already in the stipulation with regard to any breach of warranty by Firestone is immaterial to this action, to the same extent it would have been immaterial in Goldberg versus Kelly or Sniadach versus Family Finance Corporation.

It is our position that once the issue is joined, once we have established that complaints were made to Firestone, Firestone alleged repairs were made. Our client denies this. Firestone denies her allegations. That is as far as

The Court need proceed regarding that question.

It would be improper for this Court to determine whether or not in fact the breach was made, just as the Supreme Court did not determine in Goldberg versus Kelly whether welfare rights were terminated rightfully or wrongfully.

I would like some instruction from The Court whether [fol. 6] they would wish testimony as to the breach of

warranty.

JUDGE DYER: I'm not sure I follow you at all. Are you asking us whether or not there is a relevant consideration in this case with respect to the warranty concerning the icebox and the stove, et cetera?

MR. ABBOTT: What I am saying is that in the stipulation we have stipulated that Margarita Fuentes made certain complaints about the stove. We have stipulated

there was a service policy on the stove.

JUDGE DYER: What does that have to do with the real issue in this case?

MR. ABBOTT: I think very little. I think the issue is whether, in fact—do you want testimony on this point? That was one of the questions on which we disagreed in

the stipulation.

JUDGE DYER: We are of the view that has no relevancy to this question we are called upon to determine. We had no control over what you stipulated. You might have stipulated the moon is made of cheese. We don't have to consider matters that we don't think are relevant.

MR. WRIGHT: If I may, Your Honor, on behalf of [fol. 7] the Defendant Firestone, I concur with Mr. Abbott that any evidence or testimony with respect to an alleged breach of warranty by Mrs. Fuentes against Firestone with respect to either of the two articles of merchandise which form the subject matter of the replevin action is wholly immaterial to the issues involved in this lawsuit, for the reason that neither a breach of warranty nor failure of consideration is a valid defense under the laws of the State of Florida.

When we prepared the Stipulation of Facts which was ultimately filed with the Court, Mr. Abbott at that time asserted that Mrs. Fuentes did complain of difficulties with one of the two articles of merchandise involved, namely, the stove. We recited in the stipulation a dispute in that regard between his client (Mrs. Fuentes) and our client (Firestone) as to whether or not there was anything wrong and whether or not repairs were made or satisfactory repairs were made.

At the conclusion of the stipulation, both parties did reserve the right to object to any relevancy or object to the Court's consideration of any matters that were contained in the stipulation upon the grounds that they were [fol. 8] irrelevant or immaterial. That, of course, would be our objection to any testimony along that line. And apparently Counsel for the Plaintiff agrees that it is not

material to the issues before this Court.

JUDGE DYER: I take it that you have just told us

that you are agreeable with our ruling?

MR. WRIGHT: I am agreeing with it if it is the ruling that it is immaterial. I wholeheartedly agree, Your Honor.

JUDGE DYER: I thought that is what we announced, that we didn't attach any relevancy in connection with the questions posed for our consideration and determination.

MR. WRIGHT: Thank you, sir.

MR. ABBOTT: So that we can understand each other, what you are interested in is this circumstance surround-

ing the repossession of it, is that correct?

JUDGE DYER: We are interested, Mr. Abbott, in whatever proof you may desire to adduce to sustain the contention that you made that a portion, at least, of this statutue is unconstitutional.

MR. ABBOTT: It is my position that, in fact, all the [fol. 9] facts that you need to know are in that stipula-

tion.

JUDGE DYER: Then there is no need to adduce anymore evidence? We are not going to try your case for you. We want to give everyone an opportunity to produce whatever evidence they think is relevant in this case with respect to the question that is posed to us; that is, whether or not the provisions of this statute which you have attest are unconstitutional.

Now, whatever evidence you desire to adduce in that connection we are here to hear and to rule upon it with respect to its relevancy to that issue.

MR. ABBOTT: Fine. If I may have a minute?

MR. TURNBULL: In the interim, may I be heard—I am from the Attorney General's Office—where he gets his witnesses from?

JUDGE DYER: Let's wait a minute until he has an

opportunity to decide what he wants to do.

MR. ABBOTT: May it please The Court, if it is satisfactory with The Court, we would just as soon stay with the stipulation except to the extent that Firestone [fol. 10] today may introduce evidence or make it necessary for us to rebut it.

JUDGE DYER: All right, sir. MR. ABBOTT: Thank you.

JUDGE DYER: Is Firestone going to introduce any evidence?

MR. WRIGHT: Yes, Your Honor.

JUDGE DYER: All right then.

You may proceed.

MR. WRIGHT: First let me, if I may, say to The Court that, as Mr. Abbott has stated, we filed with The Court a Stipulation of Facts pursuant to the request by The Court wherein there are only two or three disputes of facts to be decided between the parties. I think I can safely say that 95 per cent of the facts have been stipulated between Counsel for the Plaintiff and Counsel for the Defendants.

JUDGE DYER: We appreciate that.

MR. WRIGHT: So I will limit the presentation of the testimony here today solely to the two or three issues that are disputed or which are reflected by the stipulation to

be in dispute.

First, we have subpoenaed to testify here before The Court today the Deputy Sheriff, Robert Arthur Williams, [fol. 11] of the Dade County Sheriff's Department, who had served and executed the Statement of Claim and the Writ of Replevin upon the merchandise in question. Deputy Williams, I was advised last Monday, is now ill in the hospital at the University of Pennsylvania Medical School in Philadelphia and is not able to get out of the hospital. He may possibly undergo surgery and we will not know until this weekend. Therefore, he is unable to attend the hearing today.

JUDGE DYER: What do you propose to prove by

him, Mr. Wright?

MR. WRIGHT: Your Honor, I think I have resolved the matter by Mr. Abbott and I having signed this morning, which I would like to file with The Court, a Stipulation as to what Deputy Williams would testify to before this Court today. The Stipulation recites that Deputy Williams is deemed to have so testified before this Court today under oath.

JUDGE DYER: That is fine. We will accept the

Stipulation.

MR. WRIGHT: I have an original and three copies

for The Court.

We would next like to call Mr. Daley of Firestone Tire & Rubber Company as a witness. And we will try to

[fol. 12] make it very brief to cover only the points not covered by the Stipulation. Thereupon

JOHN D. DALEY

was called as a witness in behalf of the Defendant, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WRIGHT:

Q I am going to ask you to please speak up loudly so that The Court can hear you and all Counsel may hear you, if you will, please.

Will you state your full name and your address?

A John D. Daley, 1605 Southwest 90th Avenue.

Q Is that here in Miami?

Yes. A

Q What is your occupation, Mr. Daley? A Office and Credit Manager for Firestone.

Q Is that Firestone Tire & Rubber Company? A Yes.

Q How long have you been employed by Firestone? [fol. 13] A Five and a half years.

Q Back in September, 1969, were you employed by Firestone?

A Yes.

And where were you employed? That is, what was the location of your place of employment and what was your capacity?

A Credit Manager for the Firestone Store at 1200

West Flagler Street.

Q Does that store have a store number?

Yes. That is Number 2627.

Q Was that the store, Mr. Daley, from which Mrs. Fuentes in this case purchased the gas stove and the stereo?

A Yes.

Q Did you have occasion, Mr. Daley, to go to the residence of Mrs. Fuentes on the 15th of September, 1969, in connection with the service of a Writ of Replevin upon the gas stove and the stereo?

A Yes, I did.

Q Did anyone accompany you to the premises of Mrs. Fuentes?

A Yes; Ricardo Rodriguez.

Q What was Mr. Rodriguez' capacity, if any, with [fol. 14] Firestone?

A He was a salesman.

Q And what position did you hold at that time?

A Credit Manager. Q For that store?

A Yes.

Q At approximately what time did you arrive at the Fuentes residence?

A A quarter to five.

Q And did you have occasion to see or meet one Deputy Sheriff Robert Arthur Williams at this location?

A Yes, we did.

Q Did you precede Mr. Williams' arrival or did he precede yours?

A He arrived at the house before we did.

Q What type of vehicle were you in?

A We were in a company truck.

Q Upon your arrival at the Fuentes residence, would you tell The Court, please, exactly what you and Mr.

Rodriguez did?

A We waited in the truck. We parked the truck in the driveway at the house and waited while Mr. Williams [fol. 15] went to the door and spoke with the people. We waited until he was ready for us to come to the house.

Q Were you in the truck when Deputy Williams went

to the front door of the Fuentes residence?

A Yes, we were.

Q Were you able to observe him talking with anyone at the front door?

A We saw him at the front door, yes. We could not tell who he was talking to.

Q Could you tell whether or not it was an adult or a child or a man or a lady that he was talking to?

A I believe that he was speaking with a woman.

Q Did you later learn who that woman was?

A I believe it was Mrs. Delgado.

Q Do you know what her relationship is, if any, with Mrs. Fuentes?

A Daughter-in-law.

Q Can you tell The Court, please, approximately how long Deputy Williams remained on the front porch talking with this lady at the door?

[fol. 16] A Approximately three minutes.

Q Then, what did Deputy Williams do?

A He then went in the house.

Q Did you see anyone attempt to prevent him from entering the home?

A No.

Q Then, following his entry into the house, what did

you and Mr. Rodriguez do?

A We waited in the truck for a short time. We then went to the front porch and waited there.

Q Did you enter the house at that time?

A No.

Q Approximately how long did you remain on the front porch outside?

A Ten to fifteen minutes.

Q Did anyone leave or come into the home while you and Mr. Rodriguez were on the front porch?

A Mrs. Delgado left. There were two other men that

came in.

Q Approximately how long after you went on the front porch did the two other men enter the home?

A Approximately ten minutes.

Q Did they come into the home after Mrs. Delgado [fol. 17] left?

A Yes.

Q Did you have any conversation with either of these two gentlemen?

A No.

Q After these two gentlemen entered the home of the Fuentes residence—Did they enter the front door?

A Yes, sir.

Q How long did you remain upon the porch after that?

A Approximately five minutes.

Q Then what happened after that?

A Mr. Williams called us into the house, told us where the merchandise was that we were to pick up, which we picked up, put on the truck.

Q Where was the merchandise located?

A The stereo was in the livingroom; the gas range

was on the back porch.

Q Did you have any conversation with anyone within the livingroom of the Fuentes residence when you went in to pick up the merchandise?

A No.

- Q Was Mrs. Fuentes present? [fol. 18] A Yes.
- Q Did she raise any objection to you and Mr. Rodriguez picking up the stereo?

A No.

Q After picking up the stereo, what did you do with it?

A We loaded it on the truck and covered it as it was raining that day.

Q Then what did you do after loading the stereo on

the truck?

A We then went around to the back of the house, around the outside, and got the range off of the back porch and loaded it on the truck.

Q Had Deputy Williams indicated to you earlier where

the range was located?

A Yes, at the time we went in the house.

Q Was the porch on which the range was located an enclosed porch?

A No, it was not.

Q Was the range which you picked up and repossessed connected to anything?

A No, it was not.

Q Was this a gas range?

A Yes.

[fol. 19] Q Did you see another range or stove within the kitchen of the Fuentes residence?

A There was another one in the kitchen, yes.

Q What did you do with the range which you picked up off the back porch?

A We then loaded it onto the truck to leave.

Q Did you have any conversation with Deputy Williams before you left?

A Only that he asked me to sign a receipt for this

merchandise; which I did.

Q Then where did you take the two pieces of merchandise—that is, the stove and the stereo?

A These were taken back to the store and put in the

warehouse for storage.

Q Are they still maintained in storage at the Firestone warehouse?

A Yes, they are.

Q Let me hand you a document, Mr. Daley, and ask you if you can please identify this. That is, tell The Court,

please, what that document is.

A This is the ledger card. It represents the credit application that Mrs. Fuentes made. There are several [fol. 20] here because she made several different purchases, several credit applications; and a complete list of all purchases and payments made to the store by her.

Q Does that include the reflection of a purchase and such payments as were made thereon by Mrs. Fuentes upon the gas stove and stereo which were replevined?

A Yes, it does.

Q Does it also include or reflect other purchases from Firestone by Mrs. Fuentes?

A Yes, it does.

Q Were these purchases all on a time payment basis?

A Yes.

Q Did the other purchases, other than the gas stove and the stereo, as reflected thereon, precede or succeed the purchases by her of the stove and the stereo?

A All other purchases preceded the purchase of the

range and the stereo.

Q Was that record, while you were Credit Manager of the store, maintained in your custody and control? [fol. 21] A Yes, it was.

Q And it is a record maintained by Firestone in the regular course of its business?

A Yes, it is.

MR. WRIGHT: If The Court please, we would like to offer this document into evidence as Defendant Firestone's Composite Exhibit.

MR. ABBOTT: We have no objection. THE COURT: It will be admitted.

(Thereupon the documents referred to were received in Evidence as Defendant Firestone's Exhibit No. 1.)

Q (By Mr. Wright) Mr. Daley, for the information of The Court, will you, without reading any of the details upon Defendant Firestone's Exhibit No. 1, state what information is contained within each column on the front sheet and what that sheet represents as to that record.

JUDGE DYER: Mr. Wright, are you going to do this for the purpose of showing it was in default?

MR. WRIGHT: Your Honor, I think the situation

shows there was a default.

The purpose, quite frankly, of my interrogation along [fol. 22] this line is to show that the stove and the stereo were not the first two time payment purchases made by Mrs. Fuentes. It is merely to show that she was acquainted with the nature of the time purchase and, secondly, to show in previous purchases she had been notified when she had been defaulted in payment.

JUDGE DYER: I guess the document indicates that,

does it not?

MR. WRIGHT: Yes, sir. I didn't want him to read the details on it but merely for the information of The Court.

JUDGE DYER: We accept your statement that that is what the document shows.

MR. WRIGHT: Thank you, sir.

I would ask just one question, because I have two

other documents for which this is a predicate.

Q (By Mr. Wright) With respect to Defendant Firestone's Exhibit No. 1, there appears on the reverse side of the third ledger sheet or ledger card and on the reverse side of the fourth and fifth sheets or the ledger cards of this composite exhibit a column entitled "Con-

tact Record." What is the significance of that?

A These show the dates of what action was taken [fol. 23] and the fact that there was a collection notice sent on these certain dates—either a Number One Notice or a Number Two Notice. And in several instances, it shows where phone calls were made regarding collection.

Q You've referred to a Number one Notice. Let me hand you a copy of a document and ask you if you can please identify that, sir.

This is a Number One Notice.

Q Was that he type of notice referred to in Defendant's Exhibit No. 1 here?

A Yes.

Q Was that the type of notice that was utilized by that store at that time?

A Yes.

Q While I am here, let me hand you another document and ask you if you can please identify that, sir.

A This is a Number Two Notice.

Q Is that the same form of Number Two Notice referred to in Defendant Firestone's Exhibit No. 1 on the reverse side of sheets three, four and five?

A Yes.

MR. WRIGHT: We would like to offer these two [fol. 24] exhibits.

MR. ABBOTT: No objection.

JUDGE DYER: They will be admitted.

(Thereupon the documents referred to were received in Evidence as Defendant Firestone's Exhibits Nos. 2 and 3, respectively.)

Q (By Mr. Wright) Just one other question, Mr. Daley. At the time that you and Mr. Rodriguez were in the truck and Deputy Williams was at the front door of the Fuentes' home on the 15th of September, 1969, do you know whether or not or did you observe whether or not Deputy Williams had any papers or anything in his hand?

A He did have some papers in his hand, yes.

Q At any time while you were there that day, did Mrs. Fuentes or anyone else at the Fuentes' home object to you or to anyone in your presence or to Mr. Rodriguez picking up the stereo and putting it on the truck or picking up the stove and putting it on the truck?

A Not in my presence, no.

Q Just one other question, Mr. Daley. Just for the [fol. 25] record, will you identify on which sheet the date of purchase of the stove and stereo covered by the contract which is in the stipulation were purchased?

A The range would show on sheet number two and

the stereo on sheet number one.

MR. WRIGHT: Thank you, sir. I have no further questions.

You may inquire.

CROSS EXAMINATION

BY MR. ABBOTT:

Q Mr. Daley, you've testified that you could not see who answered the door when the door was entered in response to Deputy Sheriff Williams, is that correct?

A That's correct, yes.

Q So that when you testified that the Sheriff went in, you don't know really who let the Sheriff in, if anybody did, is that correct?

A I don't know, no.

Q Do you know whether Deputy Williams spoke Spanish or not?

A Some, yes.

Q Do you know whether he spoke Spanish or English at the door?

[fol. 26] A I couldn't say.

MR. ABBOTT: I have no further questions.
MR. WRIGHT: We have no further questions.

JUDGE DYER: You are excused, sir.

(Thereupon the witness was excused.)

Thereupon

RICARDO RODRIGUEZ

was called as a witness in behalf of the Defendant Firestone and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WRIGHT:

- Q Will you state your name and your address, please, sir?
- A My name is Ricardo Rodriguez. I live at 9460 Southwest 37th Street.
 - Q Is that here in Miami?
 - A Miami, yes, sir.
 - Q By whom are you employed, Mr. Rodriguez?
 - A Firestone Stores.
 - Q How long have you been employed by Firestone?
- A It is going to be close to four years; over three years and a half.
- [fol. 27] Q You are employed at what location of Firestone?
 - A 1200 West Flagler Street.
 - Q Is that the same store that Mr. Daley referred to?
 - A Yes, sir; Number 2627.
- Q In what capacity are you employed at the present time?
- A At the present time I am Credit Manager for the store.
 - Q And how long have you served in that capacity?

 A It's going to be about two and a half months
- A It's going to be about two and a half months. Q Did you succeed Mr. Daley as Credit Manager in that store?
 - A Yes.
- Q Were you employed and working at that store in the year 1969?
 - A Yes, sir.
- Q To shorten this up, Mr. Rodriguez, did you hear the testimony given by Mr. Daley with respect to the

circumstances surrounding your and his visit to the Fuentes residence on September 15, 1969, at which time [fol. 28] the stereo and the stove were replevined by Deputy Williams and placed in the Firestone truck?

A Yes.

Q Would your recollection of the events as Mr. Daley testified to then be the same as his?

A Yes, sir.

Q Just one other question, please, Mr. Rodriguez: Prior to the institution of the replevin action by Firestone to replevin the stove and stereo purchased from Firestone by Mrs. Fuentes in Small Claims Court for Dade County, did you have occasion to talk with Mrs. Fuentes with respect to any payments which she owed Firestone for that merchandise?

A Yes, I did.

Q Do you know approximately how long before that you talked with Mrs. Fuentes?

A That was prior to the time we went to the house.

Q Can you tell me approximately how long before, if you can?

A Well, I would say about 15 days or something like

that.

- Q Would you tell the court the substance of the con-[fol. 29] versation you had on that occasion with Mrs. Fuentes:
- A Well, I asked her when she was going to make the payments; and if not, we will have to repossess the merchandise and bring the merchandise to the store if she could not make payment.

Q What merchandise were you referring to?

A It was a stove and a stereo.

Q Was that the same stove and stereo which were sought to be replevined in the replevin action filed by Firestone against Mrs. Fuentes in the Small Claims Court for Dade County?

A Yes, sir.

Q Do you speak Spanish, Mr. Rodriguez?

A Yes, I do.

Q Do you speak both Spanish and English?

A Yes.

Q When you spoke with Mrs. Fuentes in this telephone conversation about which you testified, did you speak in Spanish or in English?

A I spoke in Spanish.

MR. WRIGHT: Thank you, sir.

You may inquire.

JUDGE DYER: Are there any questions, Mr. Abbott?

[fol. 30] MR. ABBOTT: We have no questions.

JUDGE DYER: You may step down.

(Thereupon the witness was excused.)

MR. WRIGHT: Thank you, sir. That is all the testimony that we have to offer in addition to the Stipulation of Facts and the Stipulation which we filed before you today.

JUDGE DYER: All right.

Now, Mr. Abbott, do you have any rebuttal?

MR. ABBOTT: We might. If we may have just a moment?

JUDGE DYER: Yes, sir.

MR. ABBOTT: Your Honor, we are not going to present any testimony.

JUDGE DYER: All right.

The Court understands that everyone who now desires an opportunity to introduce evidence in the case now has had full opportunity. The evidence is now closed.

As previously indicated—and I am sure the message was transmitted by the Clerk, the Motions that were filed and noticed for this hearing were cancelled as far as argument is concerned. The Court will consider those [fol. 31] Motions and rule on them in due course.

The Motion for Leave to File a Brief was granted with the Plaintiff given 15 days to reply with Defense Counsel given ten days to file a brief, on the record and on the papers in the cause.

The Court will recognize Mr. Jepeway. You got up

just in time.

MR. JEPEWAY: Thank you, Your Honor.

I want to make one statement, with The Court's permission, before you adjourn. I represent Universal C.I.T.

Credit Corporation, one of the amici.

I orally ask leave, on behalf of a new client who is very much concerned, the Industrial Bankers Association, to be permitted to enter the case amici curiae and to adopt the brief which has already been prepared on behalf of the amici curiae, to wit, General Motors Acceptance Corporation, Ford Motor Credit Corporation and Universal C.I.T. Credit Corporation, which will be filed on Monday and, with Your Honor's permission, I would like to state that this is a national association of more than 12,000 members throughout America with 392 members in the State of Florida who very seriously could adversely be affected by the outcome.

[fol. 32] JUDGE DYER: We will grant that. MR. JEPEWAY: Thank you very much, sir.

MR. WRIGHT: Could I make a further inquiry of The Court as to whether or not there will be a further hearing to hear legal arguments concerning the Motion for Summary Judgment which Mr. Abbott has reviewed on behalf of the Plaintiff and which Your Honor, by this recent Order, held in abeyance pending this evidentiary

hearing.

JUDGE DYER: I think that the best way to leave that at the moment, Mr. Wright, is that after we have had the advantage of briefs that are to be filed, yes, we will consider the case, and if we feel that it is necessary, then we will notify Counsel that are interested in this cause that we would like to hear arguments; and, if so, on what particular points. If the Court is satisfied that we don't need to hear argument, we won't, and we will just go ahead and rule.

So, unless Counsel hears from the Clerk that we desire argument, and I would suggest probably that if we do hear it—which I seriously doubt at this moment—but if we do, I think it would be preferable for us to indicate specific points or areas which we might want to hear

argument on, if we do.

[fol. 33] MR. WRIGHT: If I may make one further inquiry before The Court, we, as Counsel for Firestone,

are in the process of preparing a brief on the constitutional questions. I think it is true to say that it is a difficult brief to prepare and there has no provision been made to when our brief should be filed and I didn't know whether Your Honor's intentions were that we file one by Monday. If that be the intention of The Court, I would beg leave of The Court for a few additional days to prepare and file that brief in The Court.

JUDGE DYER: How long do you think you will

need?

MR. WRIGHT: I would like until a week from Mon-

day, if possible, Your Honor.

JUDGE DYER: We will certainly grant that, and we will give opposing Counsel another 15 days on that brief.

MR. WRIGHT: Thank you, sir.

JUDGE DYER: Will that be enough, Mr. Abbott? MR. ABBOTT: Yes, that will be enough. That will

be fine.

JUDGE DYER: Then that ought to close the brief-[fol. 34] ing schedule so that we will have them to take under advisement and see what we can do in this case during the summertime.

MR. WRIGHT: Thank you, sir.

JUDGE DYER: Thank you very much, gentlemen.

Court will stand adjourned.

(Thereupon at 3:10 o'clock p.m., the proceedings in the above-entitled matter were concluded.)

[fol. 35] [Certificate of Reporter (Omitted in Printing)]

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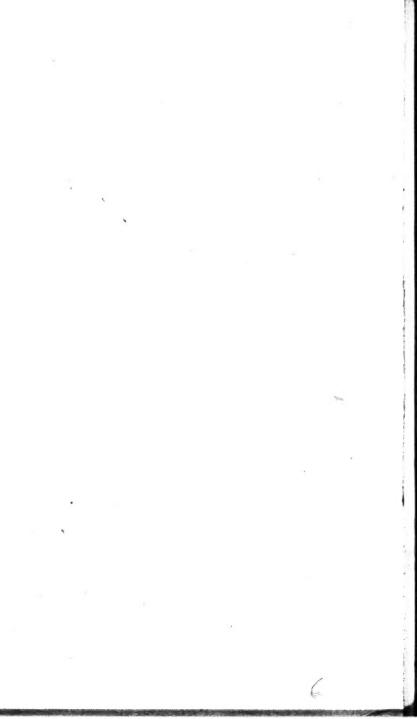
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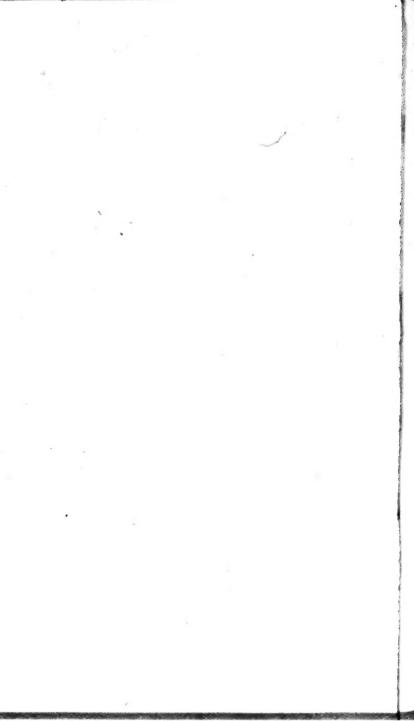
Firestone stores

1200 West Flagler Street MIAMI, FLORIDA

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FIRESTONE EXHIBIT 3

Firestone stores

1200 West Flagler Street MIAMI, FLORIDA

CREDIT DEPARTMENT

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GOOD CREDIT IS A VALUABLE ASSET

Supreme Court of the United States

No. 6060 --- , October Term, 19 70

Margarite Fuentes, et al., Appellants,

Earl Faireloth, Attorney General of Florida, et al.

APPEAL from the United States District Court for the Southern District of Florida.

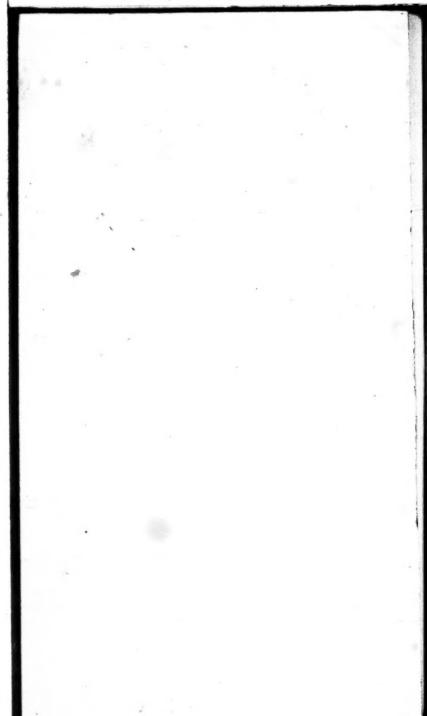
The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.



No. 70-5039

Brief, amicus curiae, of National Legal Aid & Defender Assoc. filed June 14, 1972. NOT PRINTED.

Brief of The National Consumer Law Center and the Urban Law Institute, amici curiae, filed Oct. 12, 1971. NOT PRINTED.



JUL 2 1971

NO.70-5039

E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6060 No. 5039

MARGARITA FUENTES, individually, and as a class for all those similarly situated,

Appellant,

V.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

APPELLANT'S BRIEF

BRUCE S. ROGOW
DONALD C. PETERS
RENE V. MURAI
Legal Services of Greater
Miami, Inc.
622 N. W. 62 Street
Miami, Florida 33150
Tel: (305) 759-1608

C. MICHAEL ABBOTT 2837 Pittsfield Boulevard Ann Arbor, Michigan

Attorneys for Appellant

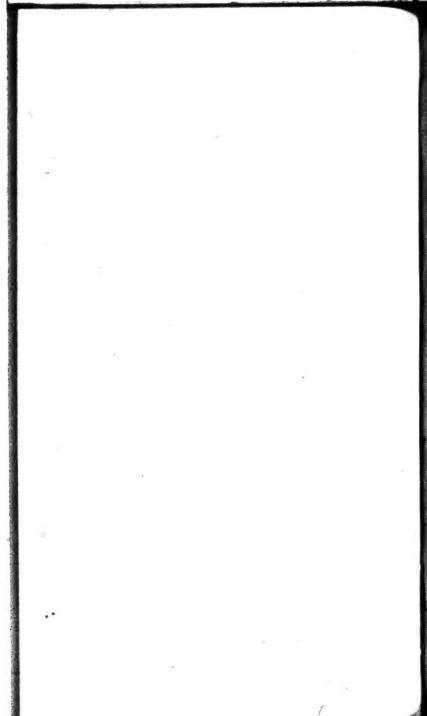


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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 6060

MARGARITA FUENTES, individually, and as a class for all those similarly situated,

Appellant,

٧.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

APPELLANT'S BRIEF

OPINION BELOW

The opinion of the United States District Court for the Southern District of Florida, entered on August 21, 1970, is reported at 317 F. Supp. 954 (A. at 62).

JURISDICTION

The jurisdiction of this Court to review by appeal the decision of a three judge panel of the United States District Court for the Southern District of Florida is conferred by 28 U.S.C. § 1253.

The judgment of the court below was entered on September 8, 1970. Notice of Appeal to this Court was filed on September 29, 1970, and appellant's Jurisdictional Statement was filed on October 22, 1970, within the time provided for appeals by 28 U.S.C. §2101(c). This Court noted probable jurisdiction on February 22, 1971. 39 U.S.L.W. 3359.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fourth and Fourteenth Amendments to the United States Constitution and Sections 78.01, 78.08, 78.10, 78.11, and 78.12 of the Florida Statutes. The pertinent text of these Amendments and statutes along with closely related provisions of Chapter 78 are set forth in Appendix A, *infra* at 57.

QUESTIONS PRESENTED

1

Whether Florida's statutory replevin procedure, insofar as it authorizes the taking of personal property by state officers pursuant to a writ issued automatically by a clerk without judicial intervention, upon the filing of ex parte allegations that the claimant is entitled to the property and the posting of a bond in double the value of the property, without notice to a defendant and without providing an opportunity to challenge the validity of the claim, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

II

Whether this statutory procedure, insofar as it authorizes state officers to enter and search private dwellings, by force if necessary, in order to seize and remove personal property therefrom, violates the Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellant purchased a stove and service policy from the FIRESTONE TIRE AND RUBBER COMPANY (hereinafter FIRESTONE) in Miami, Florida, in June of 1967, and a stereophonic phonograph from the same store in December of that year. Both purchases were made under conditional sales contracts calling for monthly payments over a period of time and were consolidated into one obligation. several occasions appellant complained to FIRESTONE about mechanical difficulties with the stove. She has asserted throughout this controversy that the stove's defects and FIRESTONE's failure to repair them constituted a breach of warranty entitling her to withhold payments. STONE has denied any failure to repair the stove. On September 15, 1969, FIRESTONE submitted a complaint and affidavit for replevin of the stove and stereo, together with a bond, to the Small Claims Court of Dade County, Florida. A prejudgment writ of replevin thereafter was issued by the clerk of that court without any judicial intervention and was executed the same day by a Deputy Sheriff of Dade County. Stipulation of Facts, A. 24-26.

The facts surrounding the execution of this replevin writ were disputed. Stipulation of Facts, A. 27-28. The Court below, viewing this dispute most favorably to appellant, found that the deputy came to appellant's home and while standing outside on her front porch attempted to explain his mission to appellant and her daughter-in-law who do not speak English. The daughter-in-law became upset and emotional upon learning that the deputy intended to take the stove and stereo and, keeping the deputy waiting on the front porch, telephoned appellant's son-in-law for assistance. Appellant's son-in-law left his place of employment and came to her home where he explained to the deputy in English that on his attorney's advice he was not going to relinquish the property until after a court proceeding. The deputy then "explained the effect of the writ . . . [and]

that he was obliged to repossess the stove and stereo in accordance with its terms." 317 F. Supp. at 956 (Stipulation of Facts, A. 28). At this point the deputy and two FIRESTONE employees who had been waiting outside appellant's home in a company truck entered the house and removed the stove and stereo. See 317 F. Supp. at 956 (A. 28-29).

Appellant brought suit in the Court below on November 29, 1969, and proceedings in the Small Claims Court were stayed by a Judge of the Small Claims Court pending the outcome of this suit. On August 24, 1970, the Court below entered its opinion. With one judge dissenting, the Court held that the Florida statutes authorizing prejudgment replevin neither contravened the Fourth nor the Fourteenth Amendments to the United States Constitution and denied appellant's request for injunctive and declaratory relief. Final judgment for appellees was entered on September 8, 1970. (A. 69-70).

SUMMARY OF ARGUMENT

I.A. The fundamental principle of due process of law is notice and a prior opportunity to be heard. E.g., Boddie v. Connecticut, 91 S.Ct. 780 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). These procedural requirements may be dispensed with only in extraordinary situations where valid state interests compel summary action. Compare Bell.v. Burson, 39 U.S.L.W. 4607 (May 24, 1971) with Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950). The apparent approval by this Court in Sniadach of McKay v. McInness, 279 U.S. 820 (1928), does not vitiate the vitality of this general rule. McKay may not have involved a taking of property within the meaning of the Fourteenth Amendment since the attachment of the defendant's property in that case did not necessarily effect a total interruption of his interest. Moreover, McKay, a per curiam decision, was

decided on the authority of Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928), and Ownbey v. Morgan, 256 U.S. 94 (1921), both of which dealt with special situations involving valid state interests.

B. Florida's statutes authorize the issuance of a prejudgment writ of replevin by a clerk of a court without judicial intervention to any person who alleges that he is entitled to possession of the property and posts a bond in double the value of the property. Fla. Stat. §§ 78.01, 78.07 (1969). No prior notice is given to a defendant, nor is he afforded any opportunity to protect his interest in the property by contesting the merits of the claim against him. This procedure is virtually identical to the Wisconsin garnishment statute invalidated by this Court in Sniadach v. Family Finance Corp., supra. And, as in Sniadach, the facts of this case do not present a situation requiring special protection of a state or creditor interest.

The Florida law does not require, nor do we have here, allegations that unless summary action is taken irreparable injury is likely to occur. There is no allegation, for example, that the property held by appellant was about to be destroyed or misued, or that appellant intended to convey it fraudulently or abscond from the state. In an ordinary dispute such as the present one, no reason of any kind has been advanced why the contractual rights of the creditor could not await the usual judicial determination before the power of the state was invoked. Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (1970) (New York's replevin laws invalidated). Moreover, even the history of the writ of replevin cannot support its present uses. At common law, replevin would lie only where there had been an unlawful taking, and not in cases such as this one, where possession by the replevin defendant had been lawfully acquired. E.g., Simmons v. Williford, 50 So. 452, 453 (Fla. 1910).

C. The deprivation suffered by appellant in the instant case is protected by the Fourteenth Amendment. The Due

Process Clause protects any significant or substantial right, or any taking of property which cannot be considered de minimus. E.g., Boddie v. Connecticut, supra; Sniadach v. Family Finance Corp., supra. Appellant here purchased the items replevied under a conditional sales contract which gave her the right to the exclusive use and possession of the goods absent a breach of her obligations to the seller. The taking of these items by writ of replevin deprived her completely of the rights for which she had bargained and had already paid approximately \$400.00. Certainly, under these circumstances, she was deprived of a substantial property right, and although her loss may have only been temporary, it cannot be characterized as de minimus. Sniadach v. Family Finance Corp., supra; Goldberg v. Kelly, supra. The hardships occasioned when personal and household goods are replevied can be as severe as the ones present in those cases. Laprease v. Raymours Furniture Co., supra; Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). And here too, the possibilities of economic leverage by the creditor and the abandonment of meritorious defenses are readily apparent.

D. The provision of the Florida law that permits a defendant to reclaim the seized property by posting, within three days, a bond in double the value of the property, Fla. Stat. § 78.13 (1969), does not obviate the requirements of notice and hearing. Such a provision affords no protection to poor persons like appellant. Of 442 cases in 1969 examined by appellant's counsel in the Small Claims Court of Dade County, Florida, not one defendant had posted the redelivery bond. The "remedy" provided by the Florida law therefore does not cure the statute's unconstitutionality. See Sniadach v. Family Finance Corp., 395 U.S. at 343. Similarly the bond required of a replevying plaintiff by Fla. Stat. § 78.07 (1969) is not an adequate substitute for notice and hearing. The cost of such a bond is negligible and thus it does little to deter a claimant with a mistaken factual or legal opinion, or one who seeks to assert his claim fraudulently. Hence, the act of posting bond cannot be construed

as establishing the validity or at least the probable validity of the claim.

E. The holding of the court below that by executing the conditional sales contract appellant had waived her right to notice and hearing is clearly unsupportable. The language cited by the court from the contract, providing that "in the event of default in any payment or payments, seller at its option may take back the merchandise" (A. 34), describes merely the remedies available to the seller once the occurrence of a default is established. It does not support even an inference that appellant clearly and unequivocally waived her right to notice and hearing on the issue of default. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Even if it were otherwise, the fact that this is a standard form contract and not the product of the parties' bargaining would render such a waiver highly suspect. E.g., National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 326-27, 332 (1964) (dissenting opinions); Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 724 (N.D. N.Y. 1970)

II. The Fourth Amendment reaches all intrusions by agents of the government upon the sanctity of a man's home. Warden v. Hayden, 387 U.S. 294, 301 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886). Its protections apply to governmental intrusions on the privacy of individuals not suspected of criminal behavior. See v. Seattle, 387 U.S. 541, 543 (1967); Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

A. The procedure compelled by Section 78.10 of the Florida Statutes is a search and seizure within the meaning of the Fourth Amendment. It obligates an officer executing a replevin writ to enter the defendant's home or other building by force if the occupant is either absent or uncooperative. After entering the officer must explore throughout the premises until he finds the personal property described in the writ. This property is then seized and removed. The defendant is given neither advance notice of nor the opportunity to withhold consent to the intrusion,

exploration and resulting seizure and removal of property which may be vital to his welfare. Attempted resistance exposes the defendant to criminal and civil liability. Fla. Stat. \$8 843.01, 843.02, 78.071 (1969).

B. Individual privacy may be subordinated consistent with the Fourth Amendment to governmental intrusions found to be reasonable. The reasonableness of any intrusion should be determined by balancing the public's need to intrude against the infringement of individual privacy occasioned by that intrusion. Camara v. Municipal Court, supra at 536-37. Readily available alternatives must also be scrutized to determine whether other methods that accomplish the same public goals with less infringement on privacy exist. See Wyman v. James, 91 S.Ct. 381, 388 (1971).

The Florida replevin procedure measured by this formula is an unreasonable search and seizure. It implements no compelling public interests. It needlessly inflicts a callous, sweeping and potentially severe injury to individual privacy. It affords no advance notice and has no time limitations. Moreover, it requires a virtually unlimited intrusion upon the privacy of individual homes with authority to use force whenever necessary. Fla. Stat. § 78.10 (1969).

The decision to intrude under the Florida replevin procedure is made by the replevying plaintiff's attorney and does not receive prior judicial approval. The procedure is thus unconstitutional pursuant to the general rule that all governmental intrusions into private property conducted without prior approval of a judicial authority are unreasonable. E.g., Mancusi v. DeForte, 392 U.S. 364, 370 (1968); See v. Seattle, supra at 543.

The recent decision in Wyman v. James, supra, is an exception to this rule and illustrates that the instant case does not merit exception. In Wyman the public interests were paramount, the procedures used to implement them were narrow, and all available alternatives were inadequate. None of these criteria apply to the instant case. Here there are no comparable public interests. The means used are not narrow.

Finally, the alternative of providing notice and an opportunity to defend prior to seizure is readily available.

C. There was no consent to the invasion of privacy here when the replevin writ was executed and, for the reasons advanced previously, nothing in the conditional sales contract effected an intelligent and intentional abandonment of a known constitutional right. See *supra* at 7.

ARGUMENT

I

THE FLORIDA REPLEVIN STATUTES AUTHORIZE THE SEIZURE OF PROPERTY WITHOUT NOTICE AND HEARING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Absent an Extraordinary Situation Involving Valid State Interests, Due Process Requires Notice and a Prior Hearing.

The Fourteenth Amendment to the United States Constitution provides that no one shall be deprived of "life, liberty or property without due process of law." In a recent case, Justice Harlan summarized the procedural mandates of this clause as follows:

[The] root requirement [of due process of law is] that an individual be given an opportunity or a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. Boddie v. Connecticut, 91 S.Ct. 780, 786 (1971) (emphasis in the original).

This statement reiterates a long established doctrine that goes to the heart of appellant's due process claim: no one may be deprived of property by state action unless he is first given notice and an opportunity to be heard. Bell v. Burson, 39 U.S.L.W. 4607, 4609 (May 24, 1971); Goldberg

v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Shroeder v. New York, 371 U.S. 208 (1962); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Londoner v. City of Denver, 210 U.S. 373 (1908); Windsor v. McVeigh, 93 U.S. (3 Otto) 274 (1876). See also Armstrong v. Manzo, 380 U.S. 545 (1965); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

Only the narrowest exceptions historically have been carved into these procedural requirements. For example, this Court has upheld administrative price and rent controls prior to any hearing in times of war. Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944). It has permitted the summary seizure of vitamin products or food when the public health is threatened. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). It has refused to invalidate similar actions in other areas where the need to protect the public has been recognized. Fahev v. Mallonee. 332 U.S. 245 (1947) (conservator appointed to take possession of federal savings and loan associations); R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir.), cert. denied, 370 U.S. 911 (1962) (suspension of exemption from stock registration). And, finally, it has approved summary procedures necessitated by vital governmental functions. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (dismissal of government defense employee); Phillips v. Commissioner, 283 U.S. 589 (1931) (collection of taxes).

The common factor in these cases upholding the invasion of property rights prior to notice and hearing has been the presence of a valid state interest.¹ As pointed out by Jus-

¹It is noteworthy that in all of these cases the sammary actions approved were initiated by the government. In the instant case, it is the creditor who sets in motion the summary seizures. While the

where valid state interests compel immediate action, can the requirements of due process yield. The apparent approval by this Court in Sniadach v. Family Finance Corp., of McKay v. McInness, 279 U.S. 820 (1928), and the cases cited in that opinion, Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928) and Ownbey v. Morgan, 256 U.S. 94 (1921) does not vitiate the vitality of this general proposition. All three of these cases were concerned with attachment. The liens created by those attachments did not necessarily effect a total interruption of the owners' rights, and therefore a taking of property within the meaning of the Fourteenth Amendment may not have resulted.

In addition, it is clear that in at least Coffin Brothers and Ownbey an arguably valid state interest supported the extraordinary procedures employed. Coffin Brothers, which dealt with an assessment on a stockholder levied by a superintendent of state banks, raised the need to protect the public following a bank failure. In Ownbey a state law permitting the attachment of property of a non-resident debtor provided the means to sue and recover from an absent defendant. Both cases, therefore, dealt with special situations. Cf. Sniadach v. Family Finance Corp., 395 U.S. at 339. Finally, McKay is a per curiam decision citing only the other two cases as its authority. As there is no opinion in McKay, one can only speculate as to its meaning. Although the facts of the case are not clear from the opinion of the Maine Supreme Court, it appears that the case

former acts in the interest of the public, the latter obviously serves his own private interest. The latitude to avoid the requirements of due process which the courts afford the two should differ.

²See 395 U.S. at 340.

³The property attached in these cases was real property and stockshares. In Florida, for example, constructive control or custody by the sheriff is sufficient to attach the property. See In re Fuller, 99 Fla. 1165, 128 So. 483 (1930); Fla. Stat. § 76.14 (1969); see generally, 3 Fla. Jur. Attachment and Garnishment, § 83 (1955).

involved attachment of a non-resident's property, since the court spoke of the defendant making a "special appearance." *McInnes v. McKay*, 127 Me. 110, 112 (1928). Moreover, the Maine Court, in concluding that writs of attachment were constitutional, relied heavily on the long standing practice of this procedure. As will be discussed below, such historical considerations do not support the present uses of replevin writs.

In sum, appellant submits that two hundred years of decisions by our courts leave no doubt that, in the absence of some significant state concern compelling immediate and summary action, notice and a prior hearing are constitutionally required whenever the state seeks to deprive an individual of his property interests.

- B. Florida's Replevin Procedure Authorizes the Seizure of Property by the State Prior to Notice and Hearing and Is Not Justified by Any Valid State Interest.
 - 1. Florida's Replevin Procedure

Under Florida's replevin statutes,⁴ any person may obtain personal property held by another by filing a complaint alleging that he is lawfully entitled to the property and by posting a bond in double the value of the property claimed. Fla. Stat. §§ 78.01, 78.07 (1969).⁵ Based on this allegation

⁴Statutes similar to the ones in Florida, providing for prejudgment replevin and requiring only an allegation of right to possession, are found in 45 other states. See Section IV of the Amicus Brief filed in this case by the National Legal Aid and Defender Association, and Appendix A attached thereto.

⁵See also Form 1.937 of the Florida Rules of Civil Procedure, Fla. Stat. Ann., Vol. 31 (West Cum. Supp. 1971). In the instant case, appellee filed an affidavit, in addition to a complaint, alleging that it was entitled to the property. Although such an affidavit was required under prior Florida law, it is no longer required. See historical notes under Fla. Stat. Ann. § 78.05 (West 1964).

It should be noted that in Florida the person bringing the action need not be the owner of the property. The only issue to be decided

and the posting of the bond, the clerk of the court issues a writ commanding the sheriff to seize the goods described in the complaint. No notice, much less a hearing, need be or is given to a defendant under the Florida procedure. The defendant becomes aware of the claim against him when the sheriff comes for the property and "publicly demand[s] delivery" or, should the defendant be absent for any reason, when he returns home and finds that the property has been taken. Fla. Stat. §78.10 (1969). There is no opportunity for such a defendant to protect his interest before seizure by contesting the merits of the plaintiff's claim.

This procedure bears a marked resemblance to the Wisconsin garnishment statute recently invalidated by this Court in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Here, as under the Wisconsin statute, the Florida procedure does not contain the kinds of notice and hearing "which are aimed at establishing the validity, or at least the probable validity, of the underlying claim . . . before . . . [one] can be deprived of his property or its unrestricted use." Id. at 343 (Harlan, J., concurring) (emphasis in original). The complaint here contains merely a self-serving declaration that the claimant is entitled to the property and that is the extent of the allegations necessary to put the Florida statutory mechanism in motion. As in Sniadach, too, it is the use of the property between the initial taking and the culmination of the suit that is of concern. Thus, the property seized may be returned if the main suit comes to trial, but in the interim the defendant is deprived of his enjoyment of the property "without an opportunity to be heard and and to tender any defenses he may have, whether it be fraud or otherwise." Id. at 339. Finally, and most significantly, the facts of this case, like those in Sniadach, fail

in an action for replevin is the right to possession. E.g., Parramore v. Smith, 158 Fla. 85, 27 So.2d 670 (1946); Security Underwriting Consultants, Inc. v. Collin Tuttle Investment Corp., 173 So.2d 752 (3d Dist. Ct. App. Fla. 1965); Van Hoose v. Robbins, 165 So.2d 209 (2d Dist. Ct. App. Fla. 1964) (dictum).

to disclose a situation requiring special protection to a state or creditor interest.

2. No Valid State Interest Supports Florida's Replevin Procedure

A plain reading of Florida's replevin law indicates that it is not narrowly drawn to meet any unusual situation requiring extraordinary summary procedures. The instant case shows just how indiscriminately replevin can be used.

There is no allegation here, for example, that the property held by the appellant was about to be destroyed or misused, or that the appellant intended to convey it fraudulently or abscond from the state.6 In essence, there is no allegation that a situation exists necessitating immediate action to avoid inevitable injury to the replevying plaintiff. The present case involves no more than an ordinary dispute between private parties, and it is difficult indeed in this case to find any overriding governmental or public interest that justifies dispensing with the usual procedures required by due process. The state may have a valid interest in seeing that debts are promptly paid or that rights arising under a contract are effectively enforced. See Epps v. Cortese, F. Supp. ___, (Civ. Act. No. 70-2592, E.D. Pa., March 31, 1971), prob. juris. noted, 39 U.S.L.W. 3520 (May 24, 1971) (upholding the constitutionality of Pennsylvania's replevin law). But generally contract rights must first be judicially determined before the assistance of the state may be invoked for their enforcement. And no evidence of any kind suggests that creditors such as FIRESTONE would be left without adequate remedies if prevented from utilizing these summary procedures.7 As the Northern District of New

⁶These are examples, however, of allegations required in Florida to obtain a writ of attachment. Fla. Stat. \$\$ 76.04, 76.05 (1969). See generally 3 Fla. Jur. Attachment and Garnishment, \$ 57 (1955).

⁷See Epps v. Cortese, supra. If there is a valid public interest in speedy repossessions to avoid deterioration of the goods in the hands

York concluded in holding New York's replevin law unconstitutional, Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 724 (1970), the governmental interest under these circumstances is certainly elusive, since one might suppose that it "should encompass the welfare of the alleged debtors and consumers, as well as creditors."

In fact, the present day commercial use of writs of replevin is historically anomalous. At common law replevin writs were used to seize property claimed to have been wrongfully taken. H. Wells, The Law of Replevin § 46 (1880); B. Shipman, Handbook of Common Law Pleading 120 (3d ed. 1923); F. Maitland, The Forms of Action at Common Law 48 (1965); Simmons v. Williford, 53 So. 452, 453 (Fla. 1910); Troy Laundry Machinery Co. v. Carbon City Laundry Co., 27 N.M. 117, 196 P. 745, 746 (1921). Originally the writ was employed solely by the feudal tenant to test the legality of his lord's distress. T. Plunkett, A Concise History of the Common Law 364-69 (1936). Where, as here, a claim was made that goods or chattels were being unlawfully detained, the common law action brought for obtaining possession was detinue, not replevin. B. Shipman, supra at 118. Detinue, unlike replevin, however, was an action in the nature of a rule to show cause, commanding the defendant to appear and give his reasons why the property should not be delivered to the claimant. 26A C.J.S. Detinue §8 (1956); Miller v. Townhouse Development Corp., 178 So.2d 730 (2d Dist. Ct. App. Fla. 1965). Absent an

of the debtors, there are alternative procedures that could be utilized to accomplish this. Cf. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring). For example, preliminary hearings or final hearings such as those which exist in the landlord-tenant area could be made available. See, e.g., Fla. Stat. Ch. 51 (1969) (defendant given 5 days to answer complaints). The state's interest in summary procedures as a means to reduce the number of hearings and therefore conserve judicial and financial resources (see Epps v. Cortese, supra) cannot outweigh the individual's constitutional rights. Goldberg v. Kelly, 397 U.S. at 263; Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

allegation of an unlawful taking, the defendant at common law would be given notice and an opportunity to be heard.

With time, however, the nature of replevin has changed and in the statutory proceeding found in Florida today the common law distinctions between replevin and detinue have been erased. Evans v. Kloeppel, 73 So. 180, 182 (Fla. 1916): Miller v. Townhouse Development Corp., 178 So.2d 730 (2d Dist. Ct. App. Fla. 1965); see generally 28 Fla. Jur. Replevin §3 (1968). Thus, in the instant case an allegation that the claimant was entitled to the goods was sufficient to obtain the prejudgment writ. At the same time, a parallel development has taken place in the commercial arena. Installment credit has become the means for a good part of our nation to obtain consumer goods. See Bureau of the Census, U.S. Dept. of Commerce, The Statistical Abstract of the United States 460 (90th ed., No. 664, September, 1969); Shapiro. Installment Credit, in 7 International Encyclopedia of Social Sciences 354-62 (1968); Skilton and Helstad, Protection of the Installment Buyer of Goods Under the Uniform Commercial Code, 65 Mich. L. Rev. 1465, n. 1 (1967). Ordinary necessities and items of everyday use, which in past times would have been owned outright by their users, have become subject to summary seizure under replevin procedures such as the one found in Florida. The result is that replevin today not only can be used in a manner unauthorized by the common law, but also threatens different rights and interests. A form of action that was employed to test the validity of an alleged wrongful taking has become today the means to deprive consumers of goods rightfully purchased, solely because of a belief by an alleged creditor that a default has occurred. When a procedure changes so significantly over the years, it cannot claim immunity from constitutional reexamination because of its historical antiquity. See Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969).

C. The Deprivation Suffered by Appellant Is Protected by the Due Process Clause.

The Due Process Clause has been said to protect any significant property interest or substantial right. E.g., Boddie v. Connecticut, 91 S.Ct. 780, 786 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). It has also been stated that due process protects the individual from any taking of property which is not de minimus. Sniadach v. Family Finance Corp., 395 U.S. at 342 (Harlan, J. concurring).

Appellant in this case is the purchaser of a stove and a stereophonic phonograph under conditional sales contracts. The stereo was purchased last, in November, 1967, at which time the obligations for the stove and stereo were consolidated into one contract. The total of appellant's indebtedness at that time was \$612.75 payable over a period of 24 months. Stipulation of Facts, A. 25. As in all conditional sales, appellant obtained the goods prior to full payment percisely because she deemed their immedate use worthy of contracting to pay finance or "handling" charges. Stipulation of Facts, A. 25. Therefore, appellant's possession at the time the property was seized pursuant to the writ of replevin was not the result of a gratuitous gesture by the seller who had retained title to the merchandise, but rather a bargained for right inherent in the nature of these contracts. In addition, appellant's right of possession and use of the property purchased under these contracts was exclusive and continuous, and could have only been defeated by a breach of her obligations to the seller. See Affidavit of Vincent G. Morgan, Manager of Retail Credit for Appellee FIRESTONE, A. 51.

The execution of the replevin writ resulted in appellant's total loss of the rights of use and possession which she had acquired under her contract, rights for which she had already paid approximately \$400.00. Stipulation of Facts, A. 25.

Under these circumstances, plaintiff obviously was deprived of a substantial property interest.⁸

Moreover, although the loss suffered by appellant was only temporary, such a loss cannot be characterized as de minimus. Similar temporary intrusions of an individual's proprietory interests have been condemned by this Court recently in Sniadach v. Family Finance Corp., supra and Goldberg v. Kelly, supra. Although the court below was of the opinion that these two cases were limited to wages or their equivalent, 317 F. Supp. at 958 (A. 66), the same kinds of hardships that existed in those cases can be present where personal and household goods are summarily seized.9

⁸The fact that under this transaction the seller retained title to the property does not weaken appellant's constitutional claim. Undoubtedly the Constitution protects more than the rights of owners of property. Various other kinds of rights and interests have in the past found safeguard in the requirements of notice and a prior hearing. Primary, of course, and most closely related to the instant case are the interests in the use of wages and welfare benefits present in Sniadach and Goldberg. Similarly, it has been held that a tenant is constitutionally entitled to a hearing prior to being evicted. Mendoza v. Small Claims Court, 49 Cal. 2d 668, 321 P.2d 9 (1958). See also Mihans v. Municipal Court, 7 Cal. 3d 479, 87 Cal. Rptr. 17 (1st App. Div. 1970). Other uses of property which have merited constitutional protection include easements. See P. Nichols, The Law of Eminent Domain \$5.72(1) and authorities cited therein at 105 n.2 and 107 n. 3 (rev. 3d. ed. J. L. Sackman 1963). Beyond this, the observation of Justice Brennan in Goldberg v. Kelly, 397 U.S. at 262 n. 8, would seem pertinent to this case: "Much of the existing wealth of this country takes the form of rights that do not fall within the traditional common law concepts of property. It has been aptly noted that 'society today is built around entitlement ""

⁹In attempting to distinguish *Sniadach* from the instant case, appellee FIRESTONE has noted in prior arguments that appellant's stove was not in use at the time of the repossession and therefore no hardship could have been occasioned to the appellant. Although we do not believe that the requirements of notice and hearing are strictly limited to *Sniadach*-type situations, we would note that the stove in this case was not functioning because of the very reason that led Mrs. Fuentes to withhold her payments: the stove did not function properly. Perhaps a more compelling factual situation would have

Thus, the three-judge court in Laprease v. Raymours Furniture Co., observed:

Lack of refrigeration, cooking facilities and beds create hardships, it would seem, equally as severe as the temporary withholding of ½ of Sniadach's pay, and measured by *Sniadach*, the hardships imposed cannot be considered *de minimus*. 315 F. Supp. at 723.

And in Hall v. Garson, the Fifth Circuit Court of Appeals stated:

The same kind of deep personal hardship can result from the seizure of personal and household goods as resulted from the garnishment of wages under the Wisconsin statute in *Sniadach*. 430 F.2d 430, 441 (1970).

Furthermore, where goods in every day use are summarily taken from an alleged debtor and placed under the control of his creditor's attorney, the possibility of economic leverage is by no means absent. See generally D. Caplovitz, The Poor Pay More 21, 157-67 (1965). The taking of the debtor's property may indeed often result in dubious or fraudulent claims being paid by the alleged debtor. Laprease v. Raymours Furniture Co., 315 F. Supp. at 723 n. 11. The more important the item replevied is to the economic, physical or emotional well-being of the debtor, the greater the strain and the more likely that valid defenses will be

been present here had Mrs. Fuentes depended on the stove at the time of repossession, although the other item taken, the stereo, was in use at that time. It would be ironic indeed if appellee FIRESTONE were to benefit from the fact that Mrs. Fuentes' stove was not in use, if, as she alleges, the appellee brought this result about by failing to honor its warranty. It would be even more ironic if, had the stove been operative because FIRESTONE had fulfilled its obligation to repair, the taking were to be deemed unconstitutional because of the adversity occasioned.

"relegated to the dustbin." Klim v. Jones, 315 F. Supp. 109, 123 (N.D. Cal. 1970). 10

In addition, although Sniadach and Goldberg are the most recent decisions by this Court dealing with temporary takings of property, they by no means represent the only instances when this question has been before the Court. In almost all of the cases cited previously where summary invasions of property interests have been upheld (see section IA supra) the actions complained of were only of temporary duration subject to later judicial review. In finding that due process had not been violated in those cases, the Court looked to the governmental interest present in each instance, rather than relying exclusively upon the fact that the deprivation suffered was not final. For example, in Yakus v. United States, where the validity of administrative price fixings without prior hearings was at issue, the Court concluded:

Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity. 321 U.S. 414, 442 (1944) (Emphasis supplied.)

Similarly, in Phillips v. Commissioner, it was observed:

Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. 283 U.S. 589, 597 (1931).

Thus, we submit that it is the presence of a compelling state interest, rather than the fact that a taking is not final,

¹⁰In addition, the defendant who resists this economic coercion may still find the presentation of his case substantially prejudiced by Florida's replevin procedure. For example, where, as here, the debtor puts in issue the condition of the property seized, Florida procedure nonetheless transfers sole custody and control of this potentially critical evidence to his adversary for an indefinite period pending trial. Discovery procedures offer bare protection, if any, against the myriad possibilities of accidental or intentional alteration of this evidence.

which traditionally has been determinative of whether the requirements of notice and hearing may be obviated. As we have sought to show previously, such state interests cannot justify the existing indiscriminate use of replevin writs.

Finally, several federal and state courts, in addition to the Northern District of New York, Laprease v. Raymours Furniture Co., supra, have disagreed with the court below and rejected the notion that the holding of Sniadach is limited to wage garnishments. See Klim v. Jones. 315 F. Supp. 109, 122 (N.D. Cal. 1970) (Innkeeper Lien Law that does not provide for a hearing as a prerequisite to imposition of lien upon lodger who allegedly failed to pay rent held to violate due process); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (invalidating sales under distraint procedures of Pennsylvania that do not provide for a hearing prior to the tenant being deprived of his property); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970) (voiding entry of judgment by confession against debtors without adequate understanding of their contracts); Jones Press, Inc. v. Motor Travel Services, Inc., 176 N.W.2d 87, 90-91 (Minn. Sup. Ct. 1970) (statutes authorizing prejudgment garnishment of money and property without prior hearing held to violate due process); Mihans v. Municipal Court, 7 Cal.3d 479, 87 Cal. Rptr. 17 (1st App. Div. 1970) (voiding prejudgment writs of possesion evicting tenants without any hearing on the merits); Westinghouse Credit Corp. v. Edwards, No. 4067510 (Common Pleas Ct. of Detroit, Mich., Nov. 30, 1970, opinion attached as Appendix F to Appellant's Reply to Appellees Motion to Dismiss or Affirm) (Michigan Replevin law held unconstitutional in permitting seizure of property prior to notice and hearing); McConaghley v. City of New York, 60 Misc.2d 825, 304 N.Y.S.2d 136 (Civ. Ct. 1969) (unilateral determination by public hospital regarding patient's ability to pay held to violate due process); Larson v. Fetherston, 172 N.W.2d 20, 23 (Wis. Sup. Ct. 1969) (garnishment of bank accounts violates due process); Cf. Williams v. Dade County School Bd., __ F.2d ___. (No. 30249, 5th Cir., April 5, 1971); Black Students v. Williams.

317 F. Supp. 1211 (M.D. Fla. 1970) (invalidating student suspensions of 30 and 10 days for lack of notice and prior hearing). Contra Epps v. Cortese, ____ F. Supp. ____ (Civ. Act. No. 70-2592, E.D. Pa., March 31, 1971), prob. juris. noted, 39 U.S.L.W. 3520 (May 24, 1971); Brunswick Corp. v. J. & P., Inc., 424 F.2d 100, 105 (10th Cir. 1970); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969).

D. The Bonding Provisions of the Florida Replevin Procedure Do Not Obviate the Requirements of Notice and a Prior Hearing.

It was argued below that the provisions allowing a defendant to reclaim the seized property by posting within three days of the taking a bond in double its value, Fla. Stat. § 78.13 (1969), mitigates the harsh effects of the Florida procedure. An examination of that provision will reveal the fallacies in such an argument.

This reclaiming provision is of no help to persons who do not have the financial ability to post an undertaking or acquire a surety and thus provides a remedy only for those who have sufficient wealth while denying the same remedy to the poor. Furthermore, appellant has found that while a replevin plaintiff may post a bond for as little as one percent of its total cost, the current market rate for a forthcoming bond for a replevin defendant is likely to be the full value of the property or more, even though the same person filing as a plaintiff could qualify for the lower bond fee. See Affidavit of Minnie R. Burrows, A. 4-6. Additional evidence of the ineffectiveness of this "remedy" may be seen in the fact that of 442 cases examined by appellant in the Small Claims Court of Dade County, Florida for the period from January through December of 1969, not one defendant posted the requisite bond as authorized by

the Florida procedure. See Affidavit of Jonathan P. Rose, A. at 22.11

Thus, the following statement of Justice Harlan concurring in Sniadach is equally applicable to the Florida procedure:

From my standpoint, I do not consider that the requirements of 'notice' and 'hearing' are satisfied by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. 395 U.S. at 343.¹²

A second and closely related argument made below was that the bond required of the plaintiff in double the value of the property to be replevied is an adequate substitute for the prior hearing required in Sniadach, noting that in the latter case there was no bond demanded of the levving creditor. It is arguable that this security requirement may discourage the assertion of frivolous claims, although as a practical matter this is doubtful, since, as we have noted, the cost of such a bond for the replevin plaintiff is almost negligible. Such a requirement will not, however, discourage the plaintiff with a mistaken belief as to the facts or legal merits of his claim or one who fraudulently asserts his claim for whatever reason. Therefore, the act of a posting a bond cannot be construed as establishing "the validity or at least the probable validity of the underlying claims against the alleged debtor." Sniadach v. Family Finance Corp., 395 U.S. at 343 (Harlan, J., concurring). Furthermore, although the security requirement may assure the defendant that if

¹¹The reclaiming provision is so little used in fact that it appears that the property is immediately handed over to the replevying plaintiff, notwithstanding the statutory requirement that the officer keep the property for three days. See Stipulation of Facts, A. 28-29.

¹²The Wisconsin prejudgment garnishment procedure allowed the defendant to gain a release by filing a bond executed by two sureties and in 1½ times the amount of the debt specified in the complaint, Wis. Stat. Ann. § 267.21(1) (Supp. 1970-71), and closely parallels the procedure under Fla. Stat. § 78.13 (1969).

he wins on the merits he will recapture his property or its monetary equivalent and perhaps damages for loss of use, it does nothing to protect him in the interim against the deprivation occasioned by the wrongful replevin.

Other courts that have reviewed similar situations have agreed with this position. The Supreme Courts of two states have struck down prejudgment garnishment statutes notwithstanding provisions requiring an undertaking on the part of the plaintiff, McCallop v. Carberry, 1 Cal.3d 903, 906 n. 7, 83 Cal. Rptr. 666, 668-69 n. 7, 464 P.2d 122, 124-25 n. 7 (1970); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68, 70 (1969), and a California Court of Appeal has invalidated an unlawful detainer statute on due process grounds despite a plaintiff's bond requirement. Mihans v. Municipal Court. 7 Cal. App. 3d 479. 485-88, 87 Cal. Rptr. 17, 21-23 (1st Dist. Ct. App. 1970). And neither the district court below nor the Northern District of New York have indicated that the security posted by a plaintiff was a significant factor in either upholding or striking down a replevin statute on due process grounds. Compare Fuentes v. Faircloth, 317 F. Supp. 954 (A. 62), with Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D. N.Y. 1970).

E. In Executing the Conditional Sales Contract Appellant Did Not Waive Her Constitutional Rights.

In denying appellant relief, the court below was of the view that the contract executed by appellant was fatal to her constitutional claims. 317 F. Supp. at 958-59 (A. 66-68). This contract reads as follows:

The undersigned Buyer agrees to pay to the Firestone Tire & Rubber Company or to its order the amount shown in Item I in the table at the right hereof, including any prior time payment agreements which may be incorporated herein by reference, payable as shown in said table. Until such payment has

been made Buyer agrees that Seller shall retain title and right of possession of said merchandise; Buyer will not sell, remove or encumber and shall be responsible for all losses or any damage to said merchandise and in the event of default of any payment or payments, Seller at its option may take back the merchandise or affirm the sale and hold Buyer liable for the unpaid balance, including any delinquency or collection charge where permitted by law. Except for standard warranties the foregoing constitutes the entire agreement between the parties. Stipulation of Facts, Exhibit B, A. 34.

In the opinion of the court the critical clause of the contract is the one providing, "[I]n the event of default of any payment or payments, Seller at its option may take back the merchandise." Since the court found that appellant had admitted non-payment, it held that she could not now complain of the lack of a hearing.¹³

¹³Closely connected with this argument is the court's apparent conclusion that by admitting non-payment, appellant in essence was admitting FIRESTONE's right to possession of the property and therefore no controversey existed between the parties. 317 F.Supp. 958-59 (A. 68). That this is what the court had in mind is not clear to us, and did not seem clear to District Court Judge Eaton who assumed that the court's holding was merely that appellant had waived her constitutional rights. 317 F.Supp. at 959 (A. 68) (dissenting). In addition, the record in this case and the applicable law do not support such a conclusion. In finding that non-payment was in fact a default under the contract giving rise to FIRESTONE's right to take back the merchandise, the court cited no Florida law. The Uniform Commercial Code, however, which was in effect in Florida at the time of this transaction, would seem to authorize appellant's action in withholding payment. Fla. Stat. 8 672.717 (1969); cf. Fla. Stat. 8 672.610 (1969). And at least one modern Florida case has held that a defendant in a statutory replevin action has defenses available to him other than showing performance of conditions under the contract. Southside Atlantic Bank v. Lewis, 174 So. 2d 470, 471-72 (1st Dist. Ct. App. Fla. 1965).

The foregoing discussion is relevant to the extent that the court needed to find an actual controversy between the parties. But, as

The conclusion reached by the court is palpably unsupportable. The language of the contract does not support even an inference of a waiver of rights. This court has stated that a waiver of constitutional rights, at the very least, must be clear and unequivocal. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Certainly the language in question does not meet this standard. The contract merely describes the types of remedies available to the seller in the event of default. Were this not so, then the remaining portion of the clause quoted above which provides that the seller may in the alternative "affirm the sale and hold Buyer liable for the unpaid balance" would have to be interpreted as permitting something tantamount to a judgment by confession for money damages. It is submitted that such a result would be surprising even to FIRESTONE in this case.

What the writ of replevin then does is to enforce the contractual remedy of the seller without a prior determination that it is entitled to this remedy. And this is precisely the gist of appellant's procedural objections: the Florida statutes employed by FIRESTONE permit it to make a unilateral determination, of the kind usually reserved for the judiciary, that appellant has defaulted in her obligations. The language in question simply cannot be stretched to show appellant's agreement to these procedures.

Moreover, the parties' contract herein is a standard form agreement. These contracts, as has been widely recognized,

the court itself recognized, appellant had steadfastly maintained that she is not in default under the contract. 317 F.Supp. at 958 (A. 66). Whether appellant's view of the substantive law is correct is a matter for the Florida courts to decide at a hearing on the merits. The action before the three judge court below concerned only the validity of the procedures in question. See Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915), where Justice Pitney stated: "To one who protests against the taking of his property without due process of law it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." See also Williams v. Dade County School Bd., ______ F.2d ______, (No. 30249, 5th Cir., April 5, 1971).

are not the product of the parties' bargaining, nor do they represent a voluntary assent to the various provisions found in them. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 86-88 (1960); Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 530, 539-44 (1971); Kessler, Contracts of Adhesion-Some Thoughts About Freedom of Contracts, 43 Colum. L. Rev. 629, 632 (1943). In all probability appellant when she signed her contract was completely unaware of both the existence and the far-reaching consequences of the standardized clause stressed by the court below. Under these circumstances a waiver of constitutional rights is highly suspect. See National Equipment Rental. Ltd. v. Szukhent, 375 U.S. 311, 326-27, 332 (1964), (separate dissenting opinions of Black, J., and Brennan, J.); Osmond v. Spence, 39 U.S.L.W. 2660 (D. Del., May 13, 1971); Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 724 (N.D. N.Y. 1970); Santiago v. McElrov, 319 F. Supp. 284, 294 (E.D. Pa. 1970); Swarb v. Lennox, 314 F. Supp. 1091, 1100 (E.D. Pa. 1970), prob. juris. noted, 39 U.S.L.W. 3424 (March 29, 1971).

II

THE FLORIDA REPLEVIN STATUTES REQUIRE AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE RIGHT OF FLORIDA CITIZENS TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENTMENTS TO THE UNITED STATES CONSTITUTION.

A. The Procedure Compelled By The Florida Statutes Governing The Execution Of A Writ Of Replevin Requires A Search And Seizure Within The Meaning Of The Fourth Amendment.

The Fourth Amendment reaches all intrusions by agents of the public upon personal privacy and security. Terry v. Ohio, 392 U.S. 1, 17 n. 15 (1968); Poe v. Ullman, 367 U.S. 497, 550-51 (1961) (dissenting opinion). It creates a zone of privacy encompassing the "sanctity of a man's home and the privacies of life." Warden v. Hayden, 387 U.S. 294, 301 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886); see Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Its protections are enforceable against the states by the Due Process Clause of the Fourteenth Amendment. Ker v. California, 374 U.S. 23, 30-31 (1963); Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Recent decisions of this Court have extended the protection of the Fourth Amendment to governmental intrusions upon the privacy of individuals who are not under suspicion of criminal behavior. ¹⁴ See v. Seattle, 387 U.S. 541, 543

of Den ex dem. Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), relied on by the court below. Murray upheld a distress warrant authorized by act of Congress and used against delinquent collectors of federal revenue. A Fourth Amendment argument was rejected apparently because a search warrant was not a part of civil proceedings for the recovery of debts. Id. at 285. To the extent that this is the basis for the Murray decision, it has been

(1967); Camara v. Municipal Court, 387 U.S. 523, 530 (1967); cf. Wyman v. James, 91 S. Ct. 381, 384-85 (1971). In Camara, supra, Justice White explained this extension stating:

It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanctions is a serious threat to personal and family security. *Id.* at 530-31.

A Fourth Amendment search in criminal contexts contemplates an exploratory investigation for tangible items. See Terry v. Ohio, 392 U.S. 1, 16-19 (1968). The procedure compelled by the Florida replevin statutes is little different. Section 78.10 is the sole statute pertaining to the manner of executing a replevin writ and it provides:

In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof and if it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.

This provision obligates the officer executing a writ to make a reasonable exploration of the dwelling or other building to locate, seize and remove the personal property described on the writ. See, e.g., R. Shinn, Replevin 324 (1889); H. Wells, The Law Replevin 165 (1880). If the occupant

discredited by the recent application of Fourth Amendment protection to civil statutory schemes similarly devoid of a search warrant requirement. E.g., See v. Seattle, supra, (municipal fire inspections); Camara v. Municipal Court, supra, (municipal housing inspections).

is not at home when the officer calls, or if he refuses entry, the officer is required to enter, by breaking with whatever force is necessary, 15 and then to forage through the dwelling or building until he finds and removes the property. As here, this entry and exploration frequently involves the defendant's home because replevin is most often employed to recapture consumer goods located within a dwelling. The defendant has no advance notice of the intrusion and no opportunity to prevent the invasion of his privacy that attends the execution of the writ against him.

This Court's recent decision in Wyman v. James, 91 S. Ct. 381 (1971), holding that home visitation of welfare recipients was not a search, suggests that the procedure compelled by the Florida replevin statutes is indeed a search. In Wyman the caseworker's presence in the home was "both rehabilitative and investigative" and this Court decided that the investigative aspect was given "far more emphasis" than it deserved. 91 S. Ct. at 386. Moreover, this visitation was not compelled and the beneficiaries were free to refuse it without incurring criminal or civil liability. 91 S. Ct. at 386.

In contrast, there is no rehabilitative aspect mitigating the executing officer's presence in a Florida replevin defendant's

¹⁵ Proof of actual secretion or concealment of the property described on the writ in locations other than those normally expected is not required and the mere failure to produce the property after public demand has authorized entry by breaking under virtually identical statutory provisions. State v. Pope, 4 Wash. 2d 394, 103 P.2d 1089 (1940); see Broomfield v. Checkoway, 310 Mass. 68, 38 N.E. 2d 563 (1941); Howe v. Oyer, 5 Hun. 559 (N.Y. 1889). In Howe v. Oyer, supra, a forcible entry was upheld where the occupant simply was not home when the officer arrived.

In the Small Claims Court of Dade County, Florida, where the writ of replevin in the instant case issued, local practice involves issuance of a break order as a matter of course whenever entry is refused to an officer seeking to execute a writ of replevin. No additional information is required sustaining probable validity of the plaintiff's claim. However, break orders are not required by local practice for forcible entry pursuant to writs issued from either the Circuit Court or the Civil Court of Record of Dade County, Florida.

home. His presence there also goes far beyond mere investigation. He is there to dispossess the defendant and his family of tangible personal property which they may be wholly unwilling to relinquish and which may be vital to their welfare. Further, the Florida replevin procedure compels the intrusion and seizure by affording no opportunity to withhold consent. Compare Wyman v. James, 91 S. Ct. at 386. A replevin defendant's simple refusal to admit the executing officer to his home may be a criminal act in Florida¹⁶ and more active resistance will likely earn a criminal charge. See e.g., State v. Pope, 4 Wash, 2d 394, 103 P. 2d 1089 (1940: Commonwealth v. Temple, 38 Pa. D. & C. 2d 120 (Centre Co. Q. S. 1965); Commonwealth v. Valvano. 33 Pa. D. & C. 128 (Lackawanna Co. Q.S. 1936). Moreover, any refusal to cooperate exposes a replevin defendant to a contempt of court proceeding. Fla. Stat. § 78.071 (1969).17

Finally, Florida replevin procedure clearly compels a seizure because the executing officer is required to take actual physical possession of tangible personal property and remove it from the defendant's premises. Fla. Stat. §§ 78.08, 78.10 (1969). This seizure differs from a criminal seizure

If violence is offered or done to the person of the officer or legally authorized person, the offense is a felony. Fla. Stat. § 843.01 (1969).

¹⁶Such an act comes within the express language of Fla. Stat. § 843.02 (1969) which provides:

Whoever shall obstruct or oppose any [sheriff, deputy sheriff, officer of the Florida Highway Patrol]... or any personnel or representative of the department of law enforcement or legally authorized person, in the execution of legal process... without offering or doing violence to the person of the officer, shall be punished by imprisonment not exceeding one (1) year, or by fine not exceeding one thousand dollars (\$1,000).

¹⁷ This section provides:

If plaintiff has good cause to believe that defendant is secreting or concealing property sought to be replevied or any part thereof, on motion of plaintiff the court may order defendant to deliver the property to the sheriff or show cause why he should not be held in contempt for his failure so to do.

only to the extent that the property taken by replevin writ is not ordinarily used as evidence of guilt in a subsequent criminal proceeding. However, this difference is constitutionally irrelevant because "privacy is disturbed as much by a civil seizure... as it is by a criminal seizure." United States v. Undetermined Quantities of Depressant or Stimuland Drugs, 282 F. Supp. 543, 546 (S.D. Fla. 1968).

B. The Procedure Compelled By The Florida Statutes Governing The Execution Of A Writ Of Replevin Requires An Unreasonable Search And Seizure In Violation Of The Fourth And Fourteenth Amendments.

Only unreasonable searches and seizures are prohibited by the Fourth Amendment. Wyman v. James, 91 S.Ct. 381, 386 (1971); Terry v. Ohio, 392 U.S. 1, 9 (1968); Elkins v. United States, 364 U.S. 206, 222 (1960). Thus the right to be left alone that the Fourth Amendment guarantees may be subordinated to governmental intrusions deemed reasonable as a matter of public policy. 19 A compelling

¹⁸It is not inconceivable that property seized by a writ of replevin could be used as evidence in a criminal prosecution. For example, such property would be relevant to a charge under Florida's concealing property under a lien statute, Fla. Stat. § 818.01(1) (1969).

¹⁹ See Dixon, The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy, 64 Mich. L. Rev. 197, 203 (1965); Dykstra, The Right Most Valued by Civilized Man, 6 Utah L. Rev. 305, 322 (1959). This concern for public policy explains those decisions permitting warrantless searches and seizures from revenue-producing licensees in heavily regulated businesses. For example, the liquor industry has received different treatment under the Fourth Amendment by virtue of Congress' zealous protection of its revenue against fraud. E.g., Colonnade Catering Corp. v. United States, 397 U.S. 72, 75-77 (1970). Similarly, warrantless searches under Federal Food and Drug provisions, which involve some revenue concerns but more significant public interests in protecting the public from poisonous food and drugs, have been upheld. See, e.g., United States v. 935 Cases More or Less, Etc., 136 F.2d 523, 525 (6th Cir.), cert.

public need to intrude is prerequisite to approval of any governmental intrusion. District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), aff'd on other grounds, 339 U.S. 1 (1950); see Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Johnson v. United States, 333 U.S. 10, 14-15 (1948). It is only after such a public need exists that the reasonableness of a particular intrusion may be determined "by balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). Available alternatives which might accomplish the same public goals and infringe less on individual privacy should also be considered. See Wyman v. James, 91 S.Ct. at 388.

Wyman v. James, supra, is this Court's most recent balancing of a non-criminal governmental intrusion upon individual privacy. In that case several public interests including the protection of dependent children and the monitoring of federal and state revenues were served by the home visitation. The means used by the New York agency to implement its intrusion were narrowly drawn to emphasize privacy and forced entry was prohibited. 91 S.Ct. at 387. This Court considered and rejected as inadequate the suggested alternatives and concluded that the New York procedure was a reasonable infringement of privacy. 91 S.Ct. at 388, 390.

Applying this analysis in the instant case it is exceedingly difficult to articulate what public interests, if any, are served by the Florida replevin procedure. Neither appellees nor

denied sub nom., 320 U.S. 778 (1943); United States v. Eighteen Cases of Tuna Fish, 5 F.2d 979, 980 (W.D. Va. 1925). Moreover, Den ex dem. Murray v. Hoboken Land & Improvement Co., 69 U.S. (18 How) 272 (1856), relied on by the court below (A. 67), involved a compelling federal governmental interest in protecting tax revenue. The Court thus noted "that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy... Imperative necessity has forced a distinction between such claims and all others..." Id. at 281-82. (Emphasis supplied.)

the court below have advanced any. In addition, the Florida procedure is not narrowly circumscribed and in no way emphasizes individual privacy. For example, this procedure gives no advance notice of the visitation and does not limit intrusions to normal working hours. Compare Wyman v. James, 91 S.Ct. at 387. Forcible household entry and search is not only allowed but rather authorized, and indeed compelled.²⁰ Compare Wyman v. James, 91 S.Ct. at 387.

The Florida replevin procedure authorizes a callous breach of individual privacy that is potentially more sweeping and injurious than the narrow home visit and interview approved in Wyman. It requires a virtually unlimited intrusion into a dwelling or other building with express authorization to use force whenever necessary. Fla. Stat. § 78.10 (1969). Thus, the officer executing a writ is empowered to break not only the outer door but as many inside doors as are necessary to find and seize the property he seeks. He may use any technique necessary to gain entry.²¹ The authority exists

²⁰The instant case is superficially similar to Wyman v. James, supra, to the extent that in both no evidence exists showing physically forced entry. However, this factual similarity is misleading because the New York procedure approved in Wyman did not compel consent by threat of forcible entry. Justice Blackmun there noted that if consent was withheld, "[t]here [was] no entry of the home and there [was] no search." 91 S. Ct. at 386. In contrast, Section 78.10 of the Florida Statutes commands entry by forcible breaking if consent is not immediately forthcoming. Here appellant and her relatives were told in effect that they had no legal right to resist and retain possession of the stereo before it and the stove were repossessed. Stipulation of Facts, A. 28. This Court's decision in Bumper v. North Carolina, 391 U.S. 543, 550 (1968), holding non-forcible governmental entries made pursuant to a colorably lawful assertion of authority fully cognizable under the Fourth Amendment, suggests that the absence here of physical breaking should not be determinative of appellant's claim.

²¹ Breakings involving broken doors, skeleton keys and broken windows have been approved under similarly worded statutes. See, e.g., State v. Pope, 4 Wash. 2d 394, 103 P.2d 1089 (1940) (doors); Rentschler v. Fox, 130 Mich. 498, 90 N.W. 275 (1902) (skeleton key); Jones v. Herron, 1 Pa. Dist. 475 (1892) (window).

to break into and examine any cabinet, closet or other enclosure that reasonably might contain the property. And if the officer does not find the property after a thorough search of the house, he must break into any other building or enclosure which reasonably might contain it. E.g., Rentschler v. Fox, 130 Mich. 498, 90 N.W. 275 (1902); compare Wyman v. James, 91 S.Ct. at 387.

As another factor lessening the infringement of privacy in Wyman Justice Blackmun characterized the governmental official who made the intrusion as "a friend in need." Wyman v. James, 91 S.Ct. at 389. Justice Blackmun further described this official as "a caseworker of some training whose primary objective is, or should be, the welfare . . . of the aid recipient for whom the worker has profound responsibility." 91 S.Ct. at 388. By comparison, the intrusions challenged by the instant case are performed by legal process servers who are not "friends" of replevin defendants in any sense of the word. They have no responsibility to aid the replevin defendants they dispossess.²² They may be in uniform, compare Wyman v. James, 91 S.Ct. at 388, and they may be accompanied by uniformed employees of the replevying plaintiff.23 Finally, they are expressly empowered to call for assistance on any additional law enforcement personnel. Fla. Stat. § 78.10 (1969).

The procedure challenged in the instant case is additionally suspect because the decision to intrude, search and dispossess a Florida replevin defendant is made by the replevy-

²² Although not present in the instant case, instances of extra legal abuse and fraudulent manipulation of replevin defendants by such officers have been documented. See D. Caplovitz, *The Poor Pay More*, 161-67 (1965).

²³For example, in the instant case, two employees of the replevying plaintiff drove a marked commercial vehicle to appellant's home and parked it in her driveway. A. 27-28. Their presence could easily contribute to community resentment, a factor that may also be considered in assessing the reasonableness of any governmental invasion of privacy. Terry v. Ohio, 392 U.S. 1, 17 n. 14 (1968).

ing plaintiff's attorney when he decides to post a bond. There is no judicial or magisterial review of his decision. For this reason alone the Florida procedure is constitutionally infirm pursuant to this Court's mandate that subject to only a few exceptions all governmental intrusions into private property conducted without prior approval of a judicial authority are unreasonable. See, e.g., Mancusi v. DeForte, 392 U.S. 364, 370 (1968); See v. Seattle, 387 U.S. 541, 543 (1967); Agnello v. United States, 269 U.S. 20, 33 (1925).

The decision in Wyman v. James, supra, is an exception to this rule, but it is an exception explained by the analysis outlined previously, and it illustrates why the Florida procedure does not merit exception. In Wyman the public interests were substantial and compelling. The means used to achieve these goals were narrow and all alternative and arguably less intrusive means were held to be inadequate. Here, however, there are no comparable public interests served by the Florida replevin procedure. The means used here are anything but narrow and the alternative of allowing notice and an opportunity to adjudicate the right of possession before seizure is readily available. This approach would accomplish the same purpose now achieved and would postpone any intrusion upon individual privacy until after a judicial determination of the claims when public interests pertaining to enforcing judgments are present.

Finally, this Court in Wyman v. James, supra, noted that a warrant procedure possessed seriously objectionable features in the welfare context. 91 S.Ct. at 389. In a replevin context, however, a warrant procedure is applicable to the exten that additional circumstances may occasionally justify peaceful seizure of personal property without notice. For example, such a procedure could help preserve public peace by discouraging potentially violent self-help repossession attempts. These are more likely to occur in non-commercial situations involving thefts, other wrongful takings, and private loans and bailments. Prejudgment seizure may be

permitted in these instances after sufficient proof of wrong-doing or imminent destruction or concealment is presented to a judicial authority. See Comment, The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp., 17 U.C.L.A. L. Rev. 837, 849-50 (1970). When property has been initially transferred in a commercial transaction public peace seems threatened only when the property is substantially or intrisically valuable and its destruction or concealment appears likely if notice precedes seizure. Retailers of consumer goods rarely encounter this situation and tend to view replevin merely as an opportunity to "salvage any value" from the property. Affidavit of Vincent G. Morgan, Manager of Retail Credit for Appellee FIRESTONE, A. 51.

Public peace is clearly not endangered when property is lawfully transferred by sale and there is no hint that it will be jeopardized or concealed if warning is given. Here appellant purchased her stove and stereo lawfully and in no way threatened to harm or hide them. The vast majority of replevins by writ employed today in Florida arise in situations identical to appellant's and seem completely unsupported by any public interest. On the other hand, the individual privacy interests infringed as a result of the intrusion wrought by implementation of the Florida procedure have been characterized as "indispensible ultimate essentials of our concept of civilization." District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949, aff'd on other grounds, 339 U.S. 1 (1950); see Silverman v. United States, 365 U.S. 505, 511 (1961); Boyd v. United States, 116 U.S. 616, 630 (1886).

Appellant submits that a balance of these interests and available alternatives points conclusively to a judgment that the Florida procedure requires an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments.

C. Appellant Has Not Waived Her Right To Invoke the Protection Guaranteed by the Fourth Amendment.

The court below properly found no waiver of Fourth Amendment protection at the time the replevin writ was executed ²⁴ but seemingly gave the same effect to a standard-form right of possession clause in the purchase contract that appellant signed. As noted previously, supra at 24-25, this clause provided simply that "in the event of default of any payment or payments seller at its option may take back the merchandise. . . ." The court below emphasized this clause and the absence of evidence of physically forced entry in concluding that "the Fourth Amendment does not prevent private parties from contracting, as the plaintiff (appellant) here did, that one may peaceably enter the other's house." 317 F. Supp. at 958-59 (A. 67-68).

This conclusion of the District Court is untenable in several significant respects. First, the court's reasoning seems misdirected because appellant does not challenge a private invasion of protected privacy but rather a state authorized and implemented intrusion pursuant to the lawful execution of a replevin writ. Second, the language of this standardized clause makes no mention of a right to enter anyone's house. Finally, for the reasons argued previously, supra at 24-27, this contractual provision cannot encompass an intelligent, unequivocal abandonment of a known constitutional right. E.g., Johnson v. Zerbst, 304 U.S. 458 (1938).

²⁴The court below noted that when Deputy Williams arrived one resident became "upset and emotional" and protested the repossession, while a second person who was speaking for appellant advised Deputy Williams that he would not relinquish the property and relented only when Deputy Williams stated that "he was obliged to repossess the stove and stereo...." 317 F.Supp. at 956, quoting from the Stipulation of Facts, A. 27-28. The entry and search in the instant case were thus clearly made in the context of coercion; albeit colorably lawful coercion. Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

CONCLUSION

In sum, appellant asserts that she has been deprived of a substantial property interest of the kind usually protected by the Fourteenth Amendment, without prior notice or the opportunity to tender any defenses. Furthermore, her property was seized by a state intrusion upon her right to be secure in her home and effects. These acts, accomplished under the summary and extraordinary procedure of the Florida Replevin statutes, violate the most rudimentary principles of our Constitution and are not justified by any valid state concern.

For these reasons, appellant respectfully requests that the decision of the court below be reversed.

Respectfully submitted,

BRUCE S. ROGOW, ESQUIRE
DONALD C. PETERS, ESQUIRE
RENE V. MURAI, ESQUIRE
Legal Services of Greater Miam
Miami, Inc.
622 N.W. 62 Street
Miami, Florida 33150
Tel: 759-1608

C. MICHAEL ABBOTT, ESQUIRE 2837 Pittsfield Boulevard Ann Arbor, Michigan

Counsel for Appellant



APPENDIX A

PROVISIONS OF THE UNITED STATES CONSTITUTION

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

... [N]or shall any State deprive any person of life, liberty, or property, without due process of law;

Florida Statutes, § 78.01

RIGHT TO REPLEVIN.—Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond. . . .

Florida Statutes, § 78.07

BOND; REQUISITES.—Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action.

Florida Statutes, § 78.071

CONCEALMENT OF PROPERTY BY DEFENDANT; DELIVERY THEREOF TO SHERIFF.—If plaintiff has good cause to believe that defendant is secreting or concealing property sought to be replevied or any part thereof, on motion of plaintiff the court may order defendant to deliver the property to the sheriff or show cause why he should not be held in contempt for his failure so to do.

Florida Statutes, § 78.08

WRIT; FORM; RETURN.—The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.

Florida Statutes, § 78.10

WRIT; EXECUTION ON PROPERTY IN BUILDINGS, ETC.—In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof and it it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.

Florida Statutes, § 78.11

WRIT; EXECUTION ON PROPERTY CHANGING POSSESSION, ETC.—If the property to be replevied is in the possession of defendant at the time of the issuance of the writ, and passes into the possession of a third person before the execution of the writ, the officer holding the writ shall execute it on the property in the possession of the third person and shall serve the writ and summons on defendant and the third person, and the action with proper amendments, shall proceed against the third person.

Florida Statutes, § 78.12

WRIT; EXECUTION ON PROPERTY REMOVED FROM JURISDICTION.—At the time of the service of the writ if the property to be replevied is outside the territorial jurisdiction of the court issuing the writ, the officer to whom the writ is directed shall deliver it to the proper officer in the jurisdiction into which the property has been removed, and the latter officer shall execute the writ, and shall hold the property subject to the orders of the court issuing the writ.

Florida Statutes, § 78.13

WRIT; DISPOSITION OF PROPERTY LEVIED ON—The officer executing the writ shall deliver the property to plaintiff after the lapse of three days from the time the property was taken unless within the three days defendant gives bond with surety to be approved by the officer in double the value of the property as appraised by the officer, conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant.

SOLD STREET STREET

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 6000 70-5039

MARGARITA FUENTES.

Appellant,

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

BRIEF OF AMICI CURIAE

Of Counsel: Ross L. MALONE AND SHUTTS & BOWEN Miami, Florida SHEARMAN & STERLING New York, New York DIXON, BRADFORD, WILLIAMS, McKAY & KIMBRELL, P.A. Miami, Florida JEPEWAY, GASSEN & JEPEWAY Miami, Florida LYNN & LYNN Albany, New York Moore, Welbaum, Zook & JONES

HARRY N. BOUREAU PHILLIP G. NEWCOKM ERIC B. MEYERS First National Bank Bldg. Miami, Florida 33131 Attorneys for General Motors Acceptance Corporation ROBERT L. CLARE, JR. GEORGE J. WADE 53 Wall Street New York, New York 10005 Attorneys for The National Cash Register Company

Miami, Florida

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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 6060

MARGARITA FUENTES,

Appellant,

v.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

BRIEF OF AMICI CURIAE

NATURE OF INTEREST

We submit this brief on behalf of General Motors Acceptance Corporation, Ford Motor Credit Company, Chrysler Credit Corporation, White Motor Corporation, Universal C.I.T. Credit Corporation, American Industrial Bankers Association, and The National Cash Register Company, as amici curiae, pursuant to written consent by all parties as filed previously with this Court.

General Motors Acceptance Corporation, Ford Motor Credit Company, Chrysler Credit Corporation and White Motor Corporation provide financing for distribution of new products to qualified franchised dealers of those goods and for retail installment sales of new and used products. They retain security interests in automobiles, trucks, farm equipment and similar products. Their dealer financing plans provide a valuable service without which their franchisees would find it difficult or impossible to stock products for sale at retail.

Universal C.I.T. Credit Corporation is engaged in almost every aspect of consumer and industrial sales financing and lending. It is the largest independent finance company in the United States and most of its lending and financial arrangements are secured by some form of personal property.

The American Industrial Bankers Association is a national trade association of sales finance companies, consumer finance companies, industrial banks and Morris Plan banks. Its members are broadly representative of the consumer sales finance and industrial banking industry throughout the United States.

The National Cash Register Company manufactures various types of business equipment and provides financing in connection with the sale of that equipment to qualified business enterprises. Its commercial financing is secured primarily by an interest in items such as cash registers, adding machines and similar business equipment.

In sum, these amici represent a broad cross-section of the Nation's creditors who make use of the statutes under attack in this case to aid effective consumer, commercial and business financing.

QUESTIONS PRESENTED

I

Does prehearing replevin, a widely used, historically approved provisional remedy authorized by a statute which provides for safeguards including hearing on the merits, achieve a permissible balancing of the interests of both creditor and debtor and of the state and thereby accord due process to all parties to a contract dispute?

\mathbf{II}

Should this Court for the first time hold that entry of a home or place of business to take specific property held as security under a conditional sale contract on which there is probable cause to believe there has been a default violates the Fourth Amendment prohibition against unreasonable searches and seizures?

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment is a flexible instrument to make certain that the states deal with their citizens on a generally fair basis. It does not require adherence to a particular pattern but rather mandates procedures that maintain a balance of all legitimate interests and yet afford a reasonable opportunity to be heard prior to final adjudication or termination of a right.

Replevin as a provisional remedy has a long history of use. The common law has recognized and state legislatures have codified the right of persons to utilize self-help to recover wrongfully detained personal property. Self-help creates serious risk of violent altercations over the right to possession of property. Therefore, to maintain tranquillity the state uses its peace officers as a deterrent to violent resistance to repossession and as an incentive to the claimant to forego his right of self-help.

Striking down the Florida replevin statute will have several serious consequences. The courts of most of our states, like Florida, are not equipped to support the added time and expense required by an adversary hearing on notice before implementation of a provisional remedy. Prehearing replevin is an important tool in maintaining the security upon which creditors rely, and elimination of that remedy will have a telling effect on the power of those citizens who purchase goods on credit. The requirement of a hearing must result in increased costs to retail and wholesale creditors in terms of attorneys' fees, loss of goods, higher discount rates for commercial paper and increased bad debt losses.

Replevin and other similar provisional remedies to vindicate private rights in personal property have never been held by this Court violative of the Due Process Clause. This case involves replevin of particular specific chattels in which the debtor had freely and affirmatively given the creditor a security interest in return for immediate possession under a conditional sale.

Florida law, consistent with most other states, provides the debtor with an adequate and meaningful opportunity to be heard both with respect to the replevin itself and on the merits of the underlying claim by the creditor. During the pendency of the provisional remedy, replevin does not work the hardships on the debtor that caused this Court to strike down statutes permitting garnishment of a worker's wages. Furthermore, the remedy is used by those claiming rights to immediate possession in contexts totally alien to credit purchases by indigent persons. Viewed against demonstrated legitimate interests of the state, creditor and debtor, the Fourteenth Amendment does not require a hearing prior to replevin.

The repossession of goods under the Florida replevin statute does not amount to an unreasonable search and seizure proscribed by the Fourth Amendment. The Fourth Amendment grew out of a need for protection against abuse of general warrants and as a corollary to the self-incrimination privilege. Neither in England nor in the United States was the ban on unreasonable searches and seizures intended to be applied in civil actions for the recovery of debts. An unbroken line of precedents from this Court has made it clear that the Fourth Amendment does not apply in civil actions between private parties wherein an authorized peace officer conducts the recovery of possession of personal property.

Furthermore, the facts of this case make clear that in compliance with the Florida statutory scheme the repossession was reasonable and the requirements of a warrant were fulfilled. The parties had contracted that Appellee had the right to reclaim the goods upon default in payment. The entry and repossession were undertaken at a reasonable time and only after careful explanation of the situation to a representative of Appellant who allowed entry in the absence of any threat or coercion.

ARGUMENT

I

PREJUDGMENT REPLEVIN LEGITIMATELY SERVES A NUMBER OF NECESSARY COMMERCIAL FUNCTIONS.

In a wide variety of circumstances involving both private individuals and business enterprises the replevin remedy has given the holder of a security interest a useful and necessary device. Appellant and the Law Centers ignore the disparate uses of the remedy and unsupportedly assert that consumer

transactions form the usual setting for an action in replevin. E.g., L.C. Br. 3, 7.1 In fact the provisional remedy of replevin is used in a wide variety of contexts which present circumstances totally different from the stereotype of the inner-city indigent caught in the bind of overextension of credit, which Appellant claims represent the remedy's injustices.² In one of the three cases decided below in the companion action to this, Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa.), prob. juris. noted, 402 U.S. 994 (1971), property was disputed between two divorced persons. Morse v. Penzimer, 58 Misc. 2d 156, 295 N.Y.S.2d 125 (Sup. Ct. 1968), concerned disputes over the interests of a decedent's estate in a truck, a boat and a motor. In Goodbody & Co. v. Dodson, 240 So. 2d 882 (Fla. Dist. Ct. App. 1970), the owner of securities held by a broker used this remedy to secure possession and later substantiated his claim at a trial on the merits.

Even in the consumer setting, the replevin statute is not the bogeyman Appellant and the Law Centers assert. Rather, the facility with which hardpressed and impecunious consumers, without ready access to substantial funds of their own, can afford to possess both necessities and amenities of life is the result of the ease with which they are granted credit. That ease of credit in turn arises out of the ability of the creditor to realize on his security. Ease of credit and reduction of bad debt losses "is in part a reflection of increasingly sophisticated and expensive collection techniques." Heinemann, The Critics of Credit, N.Y. Times, 8/11/71, p. 49 at 55 col. 1.

¹In this Brief citations to the Record are prefixed with "R.", to Appellant's Brief with "App. Br." and to the Brief of the National Consumer Law Center and Urban Law Institute as *Amici Curiae* with "L.C. Br.". Also, Appellee Firestone Tire and Rubber Company is referred to as "Appellee".

²In fact the remedy may be used by the state, e.g., to recover license plates issued in consideration of a bad check. Op. Fla. Att'y Gen. 064-91 (1964).

Small businesses, including individual proprietorships and one-man corporations, make full use of the benefits of our credit economy. One of the amici herein, The National Cash Register Company, a supplier of accounting equipment to such small enterprises, had installment accounts receivable of \$111,752,000 as of December 31, 1970. Four of the amici are in the business of selling and financing the sale of those most portable chattels, the automobile and truck used commercially as well as privately.3 Aside from financing the retail sale of vehicles to consumers and to businesses, they give credit to their franchised dealers secured by inventory in stock. Smaller enterprises and neighborhood businesses would find it difficult or impossible to start up unless the purchase money installment credit system worked smoothly. Such entities lack the capital for a large down payment (NCR typically requires no more than 10%) and the sustained flow to service high interest rates.

Rather than conduct a thorough investigation of each credit applicant to be sure it is a viable enterprise and not a potential delinquent, most installment creditors find it more economical to rely on the security of the equipment sold and on collection efficiency in the event of default. Even in our complex society the result is easier credit and a greater opportunity to start a business, an opportunity which must be encouraged if our inner cities are to survive. One of those collection efficiencies is the ability to repossess reinforced by replevin statutes.

Indeed, in many instances the right to possession of a chattel would be rendered meaningless if the persons presently in possession could retain the property until a hearing on the merits. First, the very delay entailed in such proceed-

³For a statement of the difficult fact patterns that can be created, see e.g., Bank of Utica, Inc. v. Castle Ford, Inc. 56 Misc. 2d 201, 288 N.Y.S.2d 297 (Sup. Ct. 1968).

ing can become a powerful motive to default without cause and continue in possession. In the case of perishables, including those goods which become obsolescent, the relief available after trial on the merits could well prove illusory. During the pendency of adversary hearings, for example, the secured goods could be purposely or negligently damaged, concealed, stolen, destroyed, removed from the state or sold to a bona fide purchaser.4 Further, neither Appellant nor the Law Centers take into account the use made of replevin to recover goods from abandoned, boarded, locked premises whose continued presence is an open invitation to theft. In most instances, the creditor could not be expected to know or, for that matter, to prove that his security interest was in jeopardy and the process of proving it may well result in the evil sought to be avoided. Appellant's suggestion, therefore, that the statute is unconstitutional because "it is not narrowly drawn to meet any unusual situation requiring extraordinary summary procedures" (App. Br. 14) is impractical.

Let it be clear that we are not arguing that the system lacks abuses. We are saying that any abuse should be treated with surgical precision, not by wholesale striking down of all replevin statutes. Finally, if the conditional sale contract and ex parte replevin are in the best interests of the general public unwise commercial devices, that is a matter of legislative, not constitutional, concern.

II

THE FLORIDA REPLEVIN STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

^{*}In Dean Witter & Co. v. Bankers Trust Co., Sup. Ct. N.Y. County, Index No. 09327/71, and many similar actions ex parte writs of replevin have been used to seize stock certificates, securities, choses in action and commercial

A. "Due Process of Law" Is a Dynamic Concept, Requiring a Process of Adjustment of the Various Interests of the Parties Concerned in the Light of History, Present Conditions and the Past Course of Decisions. It is Not an Absolute Bar to Proper Summary Process Suited to Society's Needs.

Appellant, in arguing that replevin statutes violate due process, suggests that in every provisional remedy there must be an evidentiary hearing prior to any seizure of property. The Due Process Clause has, however, never been held to require that notice and a hearing must be provided before the seizure of property in all cases. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931); Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 31 (1928); Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 275-76 (1949). Due process demands only that a reasonable opportunity to be heard and present defenses be provided "at a meaningful time and in a meaningful manner." Armstrong, supra at 552.

Thus, the term "due process of law" at the very least implies a weighing and balancing of the various interests of the state and its citizens in determining whether a particular procedural scheme satisfies rudimentary principles of fairness: That balancing process was spelled out by this Court in Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970):

paper in imminent danger of being taken from the jurisdiction. Similarly in Simmons v. Williford, 53 So. 452 (Fla. 1910), a claimant could use replevin to protect his interest in an orange crop about to be picked.

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

In undertaking that task of "adjustment" of interests, this Court has been guided by several principles of analysis:

"'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [It] is compounded of history, reason, the past course of decisions . . ." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

The Florida replevin statute is fully consistent with each of these touchstones of "due process of law". Replevin statutes, enacted in almost all states, play a vital role in a wide variety of commercial transactions, derive from a long and unbroken history of use and represent a reasonable compromise among conflicting interests within the citizenry. It is our further belief that issues concerning their fairness warrant a case-by-case weighing of the relevant interests arising from specific factual contexts and that any holding of statutory invalidity should be confined to the particular fact pattern before this Court. There are manifold circumstances in which, we submit, prejudgment seizure without prior warning is vital and patently valid.

⁵As this Court recently stated in *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971): "Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."

Appellant and the Law Centers seek to have Florida's replevin statute held unconstitutional on its face and in support of their position have produced a series of hypothetical factual situations not raised by this case. Yet this Court has held that one cannot attack the constitutionality of a statute on the ground that its application to another person may be unconstitutional. Wyman v. James, 400 U.S. 309, 326 (1971) ("facts of that kind present another case for another day"); United States v. Raines, 362 U.S. 17 (1960); United States v. Wurzbach, 280 U.S. 396 (1930); Heald v. District of Columbia, 259 U.S. 114 (1922); Collins v. Texas, 223 U.S. 288 (1912). In the companion case of Parham v. Sears. Roebuck & Company, No. 6966, the Commonwealth of Pennsylvania explicitly argues that the statute should be considered apart from the facts of the case. However, that has never been the rule in this Court. In United States v. Raines, supra, the principles that guide this Court in determining the constitutionality of any statute were clearly put forth:

"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate

a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." 362 U.S. at 20-21.

Neither Goe v. Armour Fertilizer Works, 237 U.S. 413 (1915), nor Wuchter v. Pizzutti, 276 U.S. 13 (1928), both cited by the Commonwealth, stand for the contrary rule. Coe involved a Florida statute which permitted a party who had obtained a judgment against a corporation to execute against property of a stockholder "to an extent equal in amount for so much as may remain unpaid upon their subscription to capital stock and no further" when there was no property of the corporation whereon to levy. There was no requirement in the statute that the stockholder be notified either before or after the levy. Wuchter involved the validity of a New Jersey statute which failed to require service of process on non-residents in civil actions for negligent operation of automobiles on its highways, although providing for service on the Secretary of State. In each case the aggrieved party received actual notice but did not appear. After judgment against him, he sued and this Court rejected the argument that receipt of actual notice rendered the statute constitutional as applied. The thing to note is that this Court did not rely on or utilize hypothetical situations to achieve its result. Only the facts presented and statutes involved were discussed. The important factor in each case was that the notice was not required by statute, but rather the parties had through mere good fortune received notice. This Court in Coe, citing Security Trust Co. v. Lexington, 203 U.S. 323 (1906), explained that the question is not whether notice is received but whether notice is provided for by statute. The cases essentially turn on points of the law of jurisdiction and do not purport to consider "facts" dehors the record.

B. Interests of Creditors, Debtors and the State Are Served by the Replevin Remedy.

The striking down of the Florida replevin statute will only injure the interests of both creditors and debtors. Business cannot or will not absorb the resulting additional cost in its profit margins. See Affidavit of Vincent G. Morgan, R. 50, 56.

Those additional costs to lenders include attorneys' fees for replevin hearings, disappearance of goods due to the absence of safeguards pendente lite, wear and tear on goods during pendency of replevin hearings, and greater discount rates on assignment of commercial paper and contractual rights due to additional costs of collection. Such potential wear and tear is adequately shown in this case: the tone of phonographic equipment customarily declines with increased usage and the stove was placed on an open porch exposing it to the elements. And it is common knowledge that the value of an automobile, mobile by nature and subject to an array of hazards, declines even more markedly with time and use; if the default is failure of the purchaser to provide required physical damage insurance, the total value of the collateral is at risk.

In addition, the remedy of replevin is also important to wholesale financing of dealer inventory. A dealer in possession of goods which he sells in the normal course of his business can pass title to those goods to his customers free and clear of any security interest held by the inventory financer. See Fla. Stat. §679.307 (1969). The remedy of replevin is crucial at this point and allows the inventory financer to protect against additional loss by taking the collateral into his possession and preventing further sales to customers.

Experience of these amici dictate that any notice of an impending replevin results in destruction, removal or disappearance of the chattel in a high percentage of instances. The bill-collection demands which are made often and with some persistence prior to any replevin, serve only to notify the debtor that immediate action will be taken but apparently does not convince him, as the real and close threat of immediate repossession seems to do, to destroy, sell or secrete the security.

Indeed, "except for the very large concerns, most consumer lenders have suffered from depressed earnings in recent years and have encountered severe problems in raising new capital." Heinemann, supra. Increasing the costs of their bad debt losses and reducing their remedies will "naturally" result in "cutting back on the credit risks they assume" and "produce little real long-term benefit for consumers." Id.

Some finance companies, of course, will pass increased costs on to the low income consumer already purchasing on credit. To deny the creditor an adequate and practical remedy to repossess goods upon a debtor's default in payment may deny to the debtor his only means of obtaining many widely accepted or even necessary items, the enjoyment of which should not be reserved to the wealthy. Epps v. Cortese, supra at 136.

The low income consumer who purchases on credit but always timely makes his installment payments will have to bear the burden of the resulting increase in cost of credit. Also, because of the ten percent interest rate ceiling placed on retail credit by Fla. Stat. §520.34(5) (1969), there is a distinct possibility that any increased costs of credit will force small retailers to cease extending credit. See Affidavit of Vincent G. Morgan, R. 51-55.

The state has vital interests which are furthered by the remedy of replevin. The first and most immediate state and public interest is the protection of the citizenry from violence growing out of exercise of undoubted rights of self-help. At common law, one entitled to possession may seize the chattel by non-violent self-help without notice or hearing. W. Prosser, Handbook of the Law of Torts, §22 (3d ed. 1964); 3 S. Williston, The Law Governing Sales of Goods, §579a (rev. ed. 1948). He could acquire by contract an irrevocable license to enter the buyer's premises and remove the property. The statutory replevin procedure thus makes possible the utilization of a peace officer to accomplish repossession whenever necessary to insure the public peace and to protect buyers, sellers and innocent bystanders. The

⁶White Sewing Machine Co. v. Conner, 111 Ky. 827, 64 S.W. 841 (1901); McLeod v. Jones, 105 Mass. 403 (1870); North v. Williams, 120 Pa. 109, 13 A. 723 (1888). In McLeod v. Jones, supra at 405, the court stated: "In other cases a right or license to enter upon land results or may be inferred from the contracts of the parties in relation to personalty. Permission to keep or the right to have one's personal property upon the land of another involves the right to enter for its removal." W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §22 n. 41 (3d ed. 1964), thinks "such a license has been implied merely from the reservation of the right to repossess. Heath v. Randall, 1849, 4 Cush., Mass., 195; Proctor v. Tilton, 1889, 65 N.H. 3, 17 A. 638; Blackford v. Neaves, 1922, 23 Ariz. 501, 205 P. 587." There is also authority for the proposition that the secured party may enter the debtor's premises without such a clause. See Goldberg v. List, 11 Cal. 2d 389, 79 P.2d 1087 (1938); Stowers Furniture Co. v. Brake, 158 Ala. 639, 48 So. 89 (1908); Richardson v. Anthony, 12 Vt. 273 (1840). See also Madden v. Brown, 8 App. Div. 454, 40 N.Y.S. 714 (4th Dep't 1896). In adopting the Uniform Commercial Code, Florida has codified the common law rule that a secured party upon default has the right to take possession without judicial process if this can be done without breach of peace. See Fla. Stat. \$679.503 (1969). A recent attack on the constitutionality of this statute has failed. See McCormick v. First National Bank, 332 F. Supp. 604 (S.D. Fla. 1971).

Law Centers turn this justification upside down in drawing the unwarranted inference from occasional incidents that prejudgment replevin is commonly accomplished by violence. See L.C. Br. 15.

A second important state interest in the continued existence of prehearing replevin is the conservation of state financial resources and the limitation of the number of evidentiary hearings required in a given litigation. See Epps v. Cortese, supra. In the Small Claims Court (jurisdiction under \$750) of Dade County, Florida, alone, there were at least 442 prejudgment replevin actions filed in the year 1969. (R. 22). During the year 1970 there were over 325 prejudgment replevin actions in the Civil Court of Record (jurisdiction over \$750 but under \$5,000). There is every reason to believe that these statistics will continue to increase since installment credit is inextricably related to, if not responsible for, our national consumption of consumer goods.

A further legitimate and overriding state and public interest in survival of replevin statutes is the protection of the purchasing power of the state's low income citizens. As the Epps court wrote:

"Additionally, the State and creditor interests coincide in providing a protective remedy for those who have retained title to or security interest in specific and unspecialized property by authorizing procedures designed to prevent destruction, misuse or concealment of property by the debtor pending final disposition. Adequate remedies made available to creditor interests are necessary to the preservation and continuation of retail credit upon which vast numbers of people must necessarily rely in a constantly inflated economy. To deny the creditor an adequate and practical remedy may deny the debtor of his only means of obtaining many widely accepted, but costly,

items, the enjoyment of which should not be reserved to the wealthy. The preservation of adequate remedies is also necessary to the maintenance of many large and small retail businesses without which our economy might well substantially decline to the detriment of the very individuals whom plaintiffs here seek to protect." 326 F. Supp. at 135-36.

We do not assert that the remedy is immunized from abuse. Abuse of commercial codes will continue so long as there are unscrupulous sellers and fraudulent purchasers. If there are abuses, however, their correction is (a) a matter for the states' enforcement agencies, (b) with legislation or litigation directed to the particular abuse. Declaring the remedy unconstitutional because of non-inherent abuses or misapplications is an overresponsive final remedy inappropriate to the stated ill. Further, there is no reason to believe that the states are not willing or capable of correcting the abuses, absent which they do not take on a constitutional dimension. See N.Y.C.P.L.R. §7102 (1971).

C. The Antiquity of the Replevin Remedy Imports a Presumption of Constitutionality.

Appellant challenges a remedy of ancient origin, legislated in England in 1267 by the Statute of Marlbridge, 52 Henry III, ch. 21. The action of replevin is designed to vindicate a claim of right to immediate possession of property that is wrongfully held by another. Originally it was used to prevent breaches of the peace by providing an effective alternative in the King's Courts to a resort to self-help by an aggrieved person with right of possession. 2 F. Pollock & F. Maitland, The History of English Law 574-78 (2d ed. 1968). The rationale lay, not in real prop-

⁷Appellant's attempt to characterize prejudgment replevin as "historically anomalous" (App. Br. 15) falls wide of the mark. The original form

erty considerations, but in the necessity to allow the plaintiff to tend and use the animals on the disputed land. 2 Bracton, On the Laws and Customs of England 439-42 (Thorne trans. 1968). Actually the right of an attaching creditor to deprive the holder of property temporarily of its use without any prior judicial hearing reaches back into Roman times. 1 Wade, Attachment 19-22 (1886).

The constitutionality of provisions similar to those adopted in Florida has long been upheld as consistent with due process. In Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969), this Court stated that summary proceedings "may satisfy due process for attachments in general," id. at 340, citing an unbroken line of decisions holding that the states, in the course of regulating commercial relationships, were empowered to adopt statutes providing for the provisional recovery of a debtor's property — Ownbey v. Morgan, 256 U.S. 94 (1921); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); and McKay v. McInnes, 279 U.S. 820 (1929), a per curiam affirmance based on Ownbey and Coffin Bros. Acknowledging the summary proceedings as time-honored remedies, this Court, in the two signed opinions, stated that the procedures were constitutional because they provided the defendant with an opportunity to assert

indeed arose in a context of the feudal tenure, but with the merging of various similar forms in this country has since well before the Constitution been used as in this case. "In England replevin was generally restricted to its proper field of testing the legality of a distress, but in America it was frequently used instead of detinue." T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 368-69 (5th ed. 1956). See, e.g. Mass. Stat. 1789, ch. 26. "The form of action was ouseful that the action was extended to nearly all cases of unlawful caption or detention of chattels where it was sought to recover the chattels in specie." Sinnott v. Feiock, 165 N.Y. 444, 445-46, 59 N.E. 265 (1901), citing the 1788 New York statute simplifying the procedure. See also discussion by Judge Lurton in Three States Lumber Co. v. Blanks, 133 F. 479, 481-82 (6th Cir. 1904).

his defenses at a hearing subsequent to the attachment, and they were supported by valid state and creditor interests.⁸

A procedure established through long use, born in reason and uniformly accepted, although not immunized from constitutional attack, is presumptively constitutional. As Mr. Justice Holmes stated in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922):

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by Ownbey v. Morgan, 256 U.S. 94, 104, 112."

D. Constitutionality of the Florida Replevin Statute Is Not Governed by the Decision in Sniadach.

Appellants and the Law Centers rely principally on Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969), to assert that the replevin here involved was taking of property in contravention of the Fourteenth Amendment.⁹

⁸The procedures held constitutional by this Court in each of the three cases did not provide as adequate procedural safeguards as the Florida replevin statute. For example, in *McKay*, a general creditor could attach a chattel without posting any bond, security or other undertaking. And in *Ownbey*, non-resident individuals were required to post a bond before they were permitted to appear and defend their interest in the property.

⁹Appellant also cites Goldberg v. Kelly, 397 U.S. 254 (1970), in support of this claim. (E.g., App. Br. 9, 17). Goldberg logically followed from Sniadach, perhaps a fortiori, since the question concerned due process surrounding threatened termination of a governmental benefit, the fact finders need never have held a hearing and the countervailing state interest was regarded as a minimal extra fiscal and administrative burden. But most importantly, the property involved in Goldberg—welfare payments by the

In Sniadach, the court held unconstitutional a Wisconsin statute which permitted a creditor to garnish wages of an alleged debtor prior to any judicial hearing. That decision, far from "particularly controlling" (L.C. Br. 22) the outcome of this case, lacks any application to replevin.

In Sniadach, Justice Douglas stressed the sharp distinction between wage garnishment and provisional recovery of personal property:

"We deal here with wages — a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340.

That distinction, separating from all other types of personal property wages and direct substitutions for wages, has the virtue of certitude and simplicity. Certitude and simplicity, while not the only criteria to be considered, should weigh heavily in the decision of this case, which involves as it admittedly does hundreds of thousands of consumer and business transactions ranging from the very small to the quite substantial. Certitude also has jurisprudential benefits; rendering meaningless the strong term "specialized" and extending Sniadach to stoves or stereos can only result in a flood of subsequent interpretative litigation as commercial parties settle their disputes in court rather than by themselves.

Besides certitude, the Sniadach distinction between wages and all other personal property is sound. 10 As this Court

state—is the same "specialized type of property" as wages but for the source. The hardships facing the welfare recipient whose payments have been terminated are perhaps greater than those facing one whose wages are garnished.

¹⁰We think the court in Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970), was in error in extending Sniadach to "other necessaries for ordinary day-to-day living." Id. at 722. Appellant here finds such necessaries to include a second stove and a stereo set and another court extended it in general to any replevin. Blair v. Pitchess, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971) (involving a taxpayers' suit unrelated to any particular use of the claim and delivery replevin statute).

emphasized, the temporary freezing of wages creates hardships often difficult to overcome - hardships not encountered in the case of replevin or attachment. Garnishment can render the hard pressed wage earner in debt unable to meet other obligations and thereby generate further creditor action. Replevin, on the other hand, is limited to the particular chattel in which the claimant asserts a bargained for superior right to possession. Even temporary loss of a basic household item can hardly impose an economic hardship as great as garnishment of a debtor's earned wages. The evils encouraged by wage garnishment as a means of charging double or demanding "collection fees," 395 U.S. 341, are not applicable to replevin which is limited to the goods involved. Further, the bargain initially struck between debtor and creditor contemplated at least in general terms that the creditor retained a specific interest in goods with a right to repossess upon default, unlike wage garnishment which is not a subject of any underlying agreement but is applied to debts far removed from the existence of the wage.11 It ill becomes Appellant to term "a bargained for right inherent in the nature of these contracts" those terms most favorable to her, App. Br. 17 and L.C. Br. 26, while rejecting as unconscionable and unbargained for terms which may be disadvantageous to her. L.C. Br. 38. In contrast, as the court below in Epps v. Cortese, supra, put it: "... the creditor here seeks specifically identifiable property to which he has reserved title and which he now seeks in order to prevent its loss, concealment or destruction." 326

¹¹The Law Centers appear to play both sides of this question. On the one hand they say the indigent consumer does not understand that he is contracting away constitutional rights (L.C. Br. 35-37) and on the other draw vivid pictures of the "familiar" sight of the sheriff and furniture company representative taking goods from the house of a defaulting debtor (L.C. Br. 15). We suggest that the latter scene represents the general understanding of consumers of all classes, that nonpayment of an installment contract may result in repossession as a contractual right.

F. Supp. at 133. See Brunswick Corporation v. J&P, Inc., 424 F.2d 100, 105 (10th Cir. 1970); Wheeler v. Adams Co., 322 F. Supp. 645-55 (D. Md. 1971).

Sniadach is distinguishable from the instant case on the basis of the creditor's interest in recovering the property. "[This] Court held that allowing a creditor with no special need to garnish the wages of an alleged debtor prior to a hearing violated the fourteenth amendment . . ." The Supreme Court, 1968 Term, 83 HARV. L. REV. 113 (1969). The Note goes on to term any analogy between Sniadach and replevin situations "attenuated" and to acknowledge that "creditor claims that attachment is necessary to prevent fraudulent conveyances may be more relevant in this area." Id. at 117. Indeed, preservation of the bargained security is at the heart of the matter and provides the "countervailing" interest to "the temporary loss of the use of tangible goods [which] often may not be as harsh as the Court believed temporary loss of wages to be." Id. Extended beyond the ghetto consumer syndrome, the analogy to Sniadach loses any claim to credibility.

Wage garnishment presents serious collateral consequences not encountered in a replevin action. In Sniadach, this Court found that, because garnishment necessarily involves the debtor's employer in a legal proceeding, it jeopardizes the continuation of his employment. 395 U.S. at 340. Furthermore, garnishment drains a family's general income and savings and often results in imposing an unwarranted desire to settle the matter in order to mollify his employer. None of those prejudicial circumstances that led to this Court's decision in Sniadach occurs in the case of a provisional recovery of a chattel.

The other case from which the Law Centers derive comfort is *Boddie v. Connecticut*, 401 U.S. 371 (1971), which involved the relationship of the state to its citizenry but is

cited to make a point concerning rights among citizens. Those unable to pay court costs were denied any access to the courts for purposes of securing a divorce. The Boddie decision held specifically that "the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages . . " Id. at 380. Under the Florida procedure, meaningful hearing is explicitly given before final adjudication. Again, in Boddie the countervailing state interest was a modest fiscal burden, characterized by Justice Black in dissent as "practically nominal", (Id. at 390), whereas here there are countervailing considerations to the state and both parties.

Approval of the extension of Sniadach sought by Appellants and the Law Centers would require a drastic break with precedent. In fact, Sniadach itself represented a break with precedent. The Supreme Court, 1968 Term, supra at 144. But to extend that break to a case involving an even more ancient remedy widely used in divergent commercial situations should not be taken lightly. To argue, as Appellant and the Law Centers do, that Sniadach controls the outcome of this case is misleading and overlooks a serious, and we contend impassable, hurdle for Appellant's position.

E. The Florida Replevin Statute Reflects a Measured Response by the Legislature to a Practical Commercial Problem.

Replevin is available only as a limited procedure to facilitate determination of the right to possession of a chattel. In providing private individuals with this remedy, Florida like most other states has created a number of procedural safeguards to protect the defendant's interests. Before a writ is issued, a plaintiff must file a complaint stating that he is lawfully entitled to the property. The recovery cannot be

effected without the intervention of a public official who makes the replevy and also sees that the remedy is not abused. In fact, in this case, there is and can be no claim that the stereo and stove were taken other than by peaceful and even courteous means.

The plaintiff must also post a bond in an amount at least double the value of the chattel to protect the debtor by assuring collection of any damages incurred from the repossession. Moreover, the bond discourages frivolous and fraudulent claims. Of greater significance is the fact that the defendant need not await a decision on the merits but may regain the use of his property in the interim by posting a bond in the same amount as the plaintiff's. The sheriff is required to hold the property for three days to give sufficient time to post the bond. Finally, the defendant is afforded a full opportunity to defend his interests on the merits; there is no finality to the initial dispossession.

Ownbey v. Morgan, 256 U.S. 94 (1921), is illustrative of this Court's recognition of the need for an *in rem* provisional remedy in a commercial context. In upholding the constitutionality of the statute, this Court stated:

"The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice with every modern improvement, and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake

¹²In view of Appellant's contention that premiums on bonds are more costly to debtors than creditors (App. Br. 22-24), we must note that the Record fails to indicate that Appellant made any attempt to secure a bond or that she could not afford a premium.

in judicial proceedings . . . A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense." *Id.* at 110-11.

The prejudgment seizure of goods to protect the creditor claiming, generally by contract, a superior right to possession is a measured response to this practical commercial problem. The Florida replevin statute represents a studied effort by the Legislature to strike a fair balance between the needs of the commercial world and the right of a person in possession of a chattel to be protected against capricious harrassment. We believe they are fully consistent with long-standing notions of due process of law and that they rest upon a rational basis within the knowledge and experience of the enacting legislators.¹³

III

ENTRY BY A PUBLIC OFFICIAL UNDER THE AUTHORITY OF A STATE STATUTE FOR THE LIMITED PURPOSE OF RECOVERING PROPERTY SUBJECT TO A WRIT OF REPLEVIN DOES NOT CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE.

The Florida legislature has authorized a procedure in the nature of replevin for provisional recovery of personal property by a public officer acting on behalf of one claiming a

¹³See United States v. Carolene Steel Products Co., 304 U.S. 144 (1938).

right to immediate possession. Entry is provided to make that procedure effective if the officer's demand for the property is refused. Fla. Stat. §78.10 (1969). Appellant contends that the entry sanctioned by the statute contravenes the Fourth Amendment as constituting an "unreasonable search and seizure". The case law, however, seems clear that the Fourth Amendment is inapplicable to such an entry, and, even if it were, the entry here was not "unreasonable" within the meaning of the amendment.

A. The Fourth Amendment Does Not Apply to an Entry by an Authorized Public Officer Solely to Recover Possession of Personal Property.

Commencing with the landmark decision in Boyd v. United States, 116 U.S. 616 (1886), this Court has consistently held that the ambit of the Fourth Amendment does not encompass forcible entries by authorized public officers solely to recover personal property on behalf of one claiming a superior right to immediate possession. This Court has uniformly maintained the distinction between lawful entries to vindicate the right of the owner or holder of superior claim to possession and on the other hand improper intrusions by government officers to search for violations of the law, whether civil or criminal.

That important distinction was explained in Davis v. United States, 328 U.S. 582 (1946), in which this Court upheld the right of the government, acting through federal agents, to enter and seize property to which the government had a right of immediate possession. Mr. Justice Douglas, speaking for the majority, wrote:

"The distinction is between property to which the Government is entitled to possession and property to which it is not.... The distinction has had important repercussions in the law.... For an owner of prop-

erty who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful." 328 U.S. at 590-91.

That distinction was well understood by the Framers of the Constitution. This Court in Boyd recognized that the practice which precipitated passage of the Fourth Amendment was the issuance of general warrants and writs of assistance to British colonial officers to aid in enforcement of revenue laws. 116 U.S. at 624-30; Note, Search and Seizure in the Supreme Court, 28 U. Chi. L. Rev. 664, 678-79 (1961). Searches pursuant to those instruments were virtually unlimited in scope and, as a practical matter, did not differ significantly from a general search without any formal authorization. To prevent similar abuses of governmental power, the authors of the Bill of Rights not only prohibited "unreasonable searches and seizures" but further established requirements for a warrant.

¹⁴In considering the applicability of the Fourth Amendment to this case, account must be taken of the amendment's historical development. As Chief Justice Taft stated in Carroll v. United States, 267 U.S. 132 (1925), "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." 267 U.S. at 149. See Harris v. United States, 151 F.2d 837, 839 (10th Cir. 1945), aff'd, 33t U.S. 145 (1947).

¹⁵As Justice Bradley wrote in Boyd:

[&]quot;The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country...

Since such common law writs¹⁶ were in use when the amendment was adopted and continued thereafter, see supra at 17-18, the necessary conclusion is that the Fourth Amendment was never meant to apply to them. Statutes such as those of Massachusetts and New York, supra, were left undisturbed, as the Framers intended.

This Court's interpretation has been consistent with that intention. In Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856), the government's use of a distress warrant, issued without the support of an oath or affirmation was upheld as part of a summary process for collecting debts due the government. This Court rejected the contention that the warrant violated the Fourth Amendment:

"But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the act of congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other

[&]quot;These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. . . . Prominent and principal among [the abuses] was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of [criminal] libel." 116 U.S. at 625-26.

¹⁶The writ of replevin, as previously stated, was designed to vindicate the owner's right to property unlawfully held by another without compelling him to resort to self-help. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH Law 574-75 (2d ed. 1968). Other writs, such as attachment, sequestration and execution, were similarly developed to provide creditors with flexible methods of seizing property in satisfaction of a debt.

authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause." 18 How. at 285-86.

See also Mason v. Rollins, 16 F. Cas. 1061 (No. 9,252) (N.D. Ill. 1869). Corwin properly cites Murray's Lessee to show that this Court has affirmatively held the Fourth Amendment inapplicable to debt collections. E. Corwin, The Constitution of the United States of America 823 (1952).

The distinction between a general search and the more limited intrusion by common law writs was later explored in Boyd. There this Court concluded that entries by public officers pursuant to those writs were not prohibited either by the Bill of Rights or by the Constitution itself:

"The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration or an execution, is not within the prohibition of the Fourth or Fifth Amendment or any other clause of the Constitution..." 116 U.S. at 624.

As the Law Centers note, Boyd followed from Entick v. Carrington, 19 How. St. Tr. 1029 (1765), but their explanation of those cases does not bear scrutiny. The material quoted from Boyd denouncing "all invasions" (L.C. Br. 27, their emphasis) was not directed at all entries of home or premises, but concerned only those invasions for government purposes. The extremely close tie between the Fourth and Fifth Amendments in Boyd and between seizures and self-incrimination in Entick drives the point home sharply. Entick itself was concerned directly with "general warrants which permitted the widest discretion to petty officials.

These general warrants soon became common in proceedings for seditious libel against printers and authors." Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 364-65 (1921).

Subsequent decisions have reaffirmed this Court's conclusion in Murray's Lessee and in Boyd. In American Tobacco Co. v. Werckmeister, 207 U.S. 284, 301-02 (1907), this Court dismissed an objection to the admission of certain evidence allegedly illegally seized by a federal marshal who acted under a writ of replevin. Cf. Weeks v. United States, 232 U.S. 383, 397 (1914). See also United States v. 935 Cases More or Less, 136 F.2d 523, 526 (6th Cir.), cert. denied, 320 U.S. 778 (1943); United States v. Eighteen Cases of Tuna Fish, 5 F.2d 979 (W.D. Va. 1925); State v. Pope, 4 Wash. 2d 394, 103 P.2d 1089 (1940).

That conclusion is consistent not only with the history and interpretation of the Fourth Amendment but also with the common law exceptions to the action of trespass. Common law has long authorized summary seizure of personal property by a private individual claiming a right to immediate possession. In a purely civil context an owner of personal property was deemed to have an implied license to enter upon the land of another and recover property improperly detained provided that he did not use unnecessary force. See supra at 15. It would be an incongruous and unfortunate result to permit an individual to enter upon another's premises to seize property but prohibit a state official from doing so, when the official's presence will undeniably limit the chances of violence.

Appellant and the Law Centers cite Camara v. Municipal Court, 387 U.S. 523 (1967), to support a contrary result.¹⁷ They claim that Camara held the Fourth Amend-

¹⁷The companion case of See v. City of Seattle, 387 U.S. 541 (1967), for our purposes involves the same issues; the only difference is that it deals with commercial property instead of a home.

ment applicable "to a criminal or civil proceeding", L.C. Br. 27, then assume this case is a civil proceeding and accordingly apply it to condemn replevin procedures. L.C. Br. 27-34. Camara indeed was the first case extending the Fourth Amendment protection to individuals subject to governmental searches who were not accused of any crime, overruling Frank v. Maryland, 359 U.S. 360 (1959). But this Court had no need to, and did not, overrule Murray's Lessee or the Boyd language quoted above, for it was not concerned with entry of premises to vindicate private, contractually obtained rights to possession. Therein lies the distinction between the ancient replevin remedies in use contemporaneously with adoption of the Fourth Amendment and general governmental searches in Frank and Camara. Replevin writs are not governmentally inspired searches, but vindications of purely private rights. The attempt to draw distinctions between civil and criminal proceedings, as the Law Centers do (L.C. Br. 27), is not relevant here.18

B. Even if the Entry by Authority of Section 78.10 Were a "Search and Seizure" under the Fourth Amendment, the Procedures Prescribed by That Statute Are Not "Unreasonable".

Only unreasonable searches and seizures are prohibited by the Fourth Amendment. Wyman v. James, 400 U.S. 309 (1971); Terry v. Ohio, 392 U.S. 1, 9 (1968); Elkins v. United States, 364 U.S. 206, 222 (1960). Reasonableness varies with the circumstances of the search. See Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160 (1949). We believe the Florida legis-

¹⁸It was indeed acceptance of the same erroneous division of all litigation into civil and criminal that led the California Supreme Court to what we believe is an erroneous result in *Blair v. Pitchess, supra*, 486 P.2d at 1251.

lature, like most others, has so constructed its replevin statute that, as a matter of fact, the Fourth Amendment test of reasonableness is met.

Section 78.10 does not authorize a sheriff to make a general search or to rummage through the debtor's effects. Before the sheriff may take any action, the plaintiff's complaint must "describe" the property to be recovered, state that it is in the possession of the defendant and that it is wrongfully held by him. Fla. Stat. §78.10 (1969). Furthermore, before replevin the sheriff is required by §78.10 publicly to demand delivery of the property. Thus, the statute insures that the entry is limited solely to recovery of a previously identified piece of property wrongfully detained from the plaintiff. In Camara and See there were no such protections.

Indeed, the prerequisites for forcible entry by a sheriff under §78.10 are substantially the same as those for the issuance of a search warrant under the Fourth Amendment pursuant to which a warrant shall not issue but upon probable cause:

- 1. "supported by oath or affiirmation,
- "and particularly describing the place to be searched,
- 3. "and the . . . things to be seized."

Since the warrant requirements are fulfilled and since there is nothing talismanic in the word "warrant," action of the sheriff is reasonable under the Fourth Amendment. To require the sheriff also to obtain a warrant will only duplicate efforts and unduly burden our judicial system with no attendant benefit. As Justice Clark so aptly expressed in his dissent in See v. City of Seattle, 387 U.S. at 541, 554 (1967):

"I ask: Why go through such an exercise, such a pretense? As the same essentials are being followed under the present procedures, I ask: Why the ceremony, the delay, the expense, the abuse of the search warrant? In my view this will not only destroy its integrity but will degrade the magistrate issuing them and soon bring disrepute not only upon the practice but upon the judicial process. It will be very costly to the city in paperwork incident to the issuance of the paper warrants, in loss of time of inspectors and waste of the time of magistrates and will result in more annoyance to the public."

In Camara, this Court described the ill effects of the entry as follows:

- "[1] the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises,
- [2] no way of knowing the lawful limits of the inspector's power to search, and
- [3] no way of knowing whether the inspector himself is acting under proper authorization." 387 U.S. at 532.

In this case the debtor knows that upon default and failure to return the property the contract he has signed permits entry of his premises to recover that property.¹⁹ The

¹⁹As the lower court found, the critical clause in the contract between the parties is the one providing: "[I]n the event of default of any payment or payments, Seller at its option may take back the merchandise . . ." Stipulation of Facts, Exhibit B, R. 288. Appellant and the Law Centers contend there was no notice of such remedy. L.C. Br. 38-42. Requiring attention to be brought to that clause or that it be printed in bold red type, or whatever, are not safeguards of constitutional dimensions, even if they may be desirable. Further the country's poor (even if only in a general context) know that failure to pay means repossession. L.C. Br. 15.

requirement that the sheriff publicly demand delivery of the property limits his power to search. Finally, the debtor knows the sheriff is "acting under proper authorization" pursuant to the terms of the contract in helping the seller recover the merchandise.

Furthermore, under the facts of this case, the actual seizure of the stove and stereo set was not "unreasonable". As the Record indicates, the Deputy Sheriff executing the writ arrived at Appellant's residence at five o'clock on a weekday afternoon. The Deputy knocked on Appellant's door, identified himself, attempted to explain his presence, and did not proceed further until a language barrier was overcome. At the request of Appellant, the Deputy waited until the arrival of her son-in-law who was bi-lingual. The Deputy explained the effect of the writ to the son-in-law who thereupon permitted the Deputy to enter, indicated to him the precise location of the merchandise to be recovered and, without objection or protest by Appellant, allowed the repossession to take place. R. 28, 86. Thus, the facts before this Court cannot support Appellant's claim that the search was "unreasonable".

CONCLUSION

The Florida replevin statute comports with the requirements of the Due Process Clause of the Fourteenth Amendment. Furthermore, the entry by the state official for the limited purpose of recovering property did not constitute an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments. Appellant's attempt to have nullified this well-used and time-honored remedy of creditors in commercial and private transactions should be rejected. The decision of the three-judge court below should be affirmed.

September 15, 1971

Respectfully submitted,
HARRY N. BOUREAU
PHILLIP G. NEWCOMM
ERIC B. MEYERS
First National Bank
Building, Miami,
Florida 33131
Attorneys for General
Motors Acceptance
Corporation

ROBERT L. CLARE, JR.
GEORGE J. WADE
53 Wall Street
New York, New York
10005
Attorneys for The National
Cash Register Company

Of Counsel:

ROSS L. MALONE

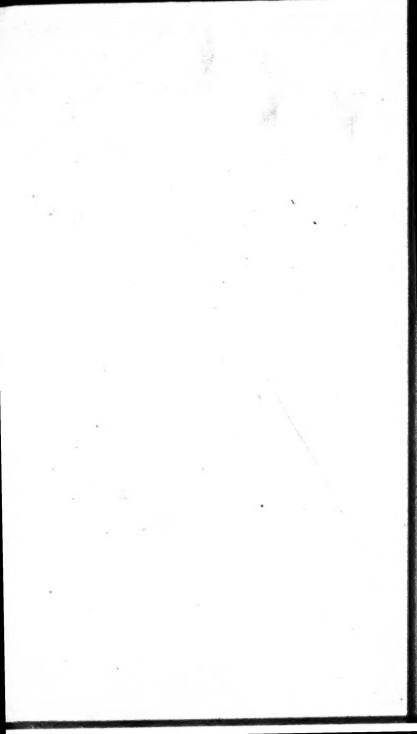
AND
SHUTTS & BOWEN
Tenth Floor, First
National Bank Building
Miami, Florida 33131

SHEARMAN & STERLING 53 Wall Street New York, New York 10005 DIXON, BRADFORD, WILLIAMS, McKAY & KIMBRELL, P.A. 9th Floor, Dade Federal Building Miami, Florida 33131 Attorneys for Ford Motor Credit Company

JEPEWAY, GASSEN & JEPEWAY
6th Floor, Dade Federal
Building
Miami, Florida 33131
Attorneys for Universal C.I.T.
Corporation and American
Industrial Bankers
Association

LYNN & LYNN
11 North Pearl Street
Albany, New York 12207
Attorneys for White Motor
Corporation

Moore, Welbaum, Zook & Jones 810 Biscayne Building Miami, Florida 33131 Attorneys for Chrysler Credit Corporation





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E ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5039

MARGARITA FUENTES,

Appellant,

V8.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and the FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

BRIEF OF APPELLEE, THE FIRESTONE TIRE AND RUBBER COMPANY

GEORGE W. WRIGHT, JR. KARL B. BLOCK, JR. 1600 First National Bank Building Miami, Florida Counsel for Appellee, The Firestone Tire and Rubber Company

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE 1600 First National Bank Building Miami, Florida Of Counsel for Appellee, The Firestone Tire and Rubber Company



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23



Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5039

MARGARITA FUENTES,

Appellant,

vs.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and the FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

BRIEF OF APPELLEE, THE FIRESTONE TIRE AND RUBBER COMPANY

QUESTIONS PRESENTED

POINT I

DOES DEBTOR IN A SECURED CREDIT TRANSACTION HAVE AN INTEREST IN CONTINUOUS POSSESSION OF THE ITEMS OF COLLATERAL WHICH RESEMBLES IN FACT THE POSSESSORY INTEREST INVOLVED IN SNIADACH AND GOLDBERG?

POINT II

IS PROCEDURAL DUE PROCESS AF-FORDED TO BOTH PARTIES TO A SECURED TRANSACTION UNDER EXISTING RE-PLEVIN PROCEDURES, PROVIDING FOR THE RIGHT OF PLAINTIFF'S TEMPORARY POSSESSION UPON GIVING BOND, THE RIGHT OF DEFENDANT TO RE-TAKE POS-SESSION PENDING TRIAL UPON GIVING EQUAL BOND, AND THE RIGHT OF TRIAL UPON THE ISSUE OF PERMANENT POS-SESSION?

POINT III

DOES THE FOURTH AMENDMENT PRO-HIBIT A PEACEABLE SEIZURE OF COL-LATERAL UNDER WRIT OF REPLEVIN, WHICH ENFORCES A CONTRACTUAL RIGHT OF POSSESSION?

INTRODUCTION

Appellant, plaintiff in the court below, will be here-inafter referred to as "appellant" or "Mrs. Fuentes". The appellees, Robert L. Shevin, Attorney General of the State of Florida, and Firestone Tire and Rubber Company, will be hereinafter referred to collectively as "appellees" or separately as "Florida's Attorney General" and "Firestone". References to the appendix filed by the appellant will be prefaced by the letter "A." References to the supplemental appendix filed herewith by Firestone will be prefaced by the letters "SA." All emphasis is ours unless otherwise indicated.

STATEMENT OF THE CASE

Appellant's statement of the case being materially incomplete and couched somewhat argumentatively Firestone takes the liberty of restating the case.

Appellant, initially applied for credit with Firestone in 1964. (A. 24). She was a 49 year old divorcee, who had been employed by an apparel factory for the previous year and a half. (A. 24). The day following her credit approval, she purchased a console television set and service policy, and in the next two years purchased a toaster, refrigerator and two bicycles, all under written conditional sales contracts providing for payment on an installment basis. (A. 24). When she renewed her credit application with Firestone in 1967, she had been employed for a year as a sewing machine operator, earning between \$300.00 and \$400.00 per month. (A. 24).

¹Since this action was filed below, the Honorable Earl Faircloth, Attorney General of Florida, was succeeded in office by the Honorable Robert L. Shevin.

On June 24, 1967, appellant purchased from Firestone a gas stove, together with a service policy. (A. 24, 25). The total price, including sales tax and documentary stamp tax, was \$180.53, payable in seventeen equal monthly installments of \$11.00. (A. 25). While Mrs. Fuentes asserted some mechanical problems with the stove, satisfactory repairs were made, according to Firestone, at no charge to appellant. (A. 25).

On November 27, 1967, Mrs. Fuentes purchased from Firestone a hi-fi set and service policy. (A. 25). With documentary stamp tax and sales tax, the total price was \$424.62. (A. 25). Both the hi-fi and stove, like her previous credit purchases, were under written contract with Firestone, who retained both the "title and right of possession of the merchandise pending full payment." (A. 32, 34). The contract provided that upon appellant's "default in any payment or payments," Firestone could repossess the goods. (A. 32, 34). Appellant made a down payment of \$40.00, leaving a net balance of \$384.62. (A. 25). The balance then remaining on her stove (136.53), less a refund of a portion of handling charge, brought the total cash balance for the stove and stereo to \$510.95. (A. 25). To this was added a new finance charge of \$101.80, for a total time balance of \$612.75, to be paid over twenty-four months commencing December 2, 1967, in monthly installments of \$26.00 each, (A. 25).

Mrs. Fuentes made \$30.00 payments on February 6, 1968, March 15, 1968, and April 9, 1968. (A. 25). On May 21, she made a \$26.00 payment, and on June 5, a \$6.00 payment. (A. 25) On July 3, 1968, she paid \$20.00 and on July 15, she paid a payment of \$208.70. (A. 25). The effect of the last payment was to prepay installments

through March, 1969. (A. 25). She failed to make the required April, 1969, installment payment, whereupon a notice of non-payment was mailed to Mrs. Fuentes. (A. 25). The May, 1969, installment payment was not made. (A. 26). Firestone sent appellant a telegram on May 12, advising her she was required to pay the past due amount that day or return the merchandise. (A. 26). She again failed to pay. (A. 26). She was telephoned about her non-payments and advised that if she could not make the past due payments, Firestone would have to repossess the stove and hi-fi. (A. 88).

None of the past due payments having been made by September 15, 1969, Firestone filed on that date a replevin action in the Small Claims Court for Dade County, Florida. (A. 26). By its Statement of Claim in that action, Firestone averred appellant's default in payment under the conditional sales contracts and demanded return of the stove and hi-fi. (A. 35). By its sworn affidavit, Firestone averred that it was lawfully entitled to possession which was detained by appellant. (A. 36). Firestone filed bond, with corporate surety, payable to the appellant in the total sum of \$408.10, conditioned to diligently prosecute the action, return the stove and hi-fi to appellant if return thereof be adjudged, and pay all sums of money recovered against Firestone by appellant in the replevin action. (A. 37).

The Small Claims Court issued its writ of replevin commanding the sheriff of Dade County, Florida, to replevy the stove and hi-fi² in the possession of appellant.

The stove and hi-fi were specifically described in Firestone's Statement of Claim and affidavit and in the court's writ of replevin as "(1) 5C207 Gas Range and (1) 1837WA Philoo Stereo."

(A. 38). The Statement of Claim and writ of replevin were delivered to the sheriff of Dade County, Florida, for service upon appellant and execution upon the stove and hi-fi. (A. 26). On the afternoon of September 15, 1969, a deputy sheriff went to appellant's home for this purpose. (A. 26). Two employees of Firestone met the deputy at this location with a truck to physicially transport the merchandise for the sheriff. (A. 27).

Upon arrival, the deputy knocked on the screen door (the main front door being open) through which he saw a woman and two boys in the living room. (A. 27). Mrs. Delgado, appellant's daughter-in-law, came to the door. (A. 27). The deputy, speaking in English, requested to see Mrs. Fuentes. Mrs. Delgado, not speaking English. apparently did not understand the deputy. (A. 27). According to him, the two boys, ages ten and twelve, who were bilingual, understood him and invited him into the Fuentes living room. (A. 27). Mrs. Fuentes then was in the living room. (A. 27). The fact of invited entry is not in dispute between the parties. There was disagreement only as to time of invitation. According to appellant, the deputy stayed on the porch at this time and the parties conversed through the screen door. (A. 27). She contends that the deputy was invited into the house, but not until later, after her son-in-law, Mr. Leon, arrived at her home. (A. 27).

The deputy identified himself, exhibited to Mrs. Fuentes, in the presence of Mrs. Delgado, the writ of replevin and Statement of Claim and explained that he was there under court order to repossess the stove and stereo for Firestone. (A. 27). Through translation by the two boys, both Mrs. Fuentes and Mrs. Delgado were able to under-

stand what the deputy said as to the purpose of his visit and the effect of the replevin writ and Statement of Claim. (A. 27). Mrs. Delgado then became somewhat upset and emotional and objected to the repossession. (A. 28). Appellant herself made no objection or protest. The deputy acquiesced in Mrs. Delgado's request for time to contact Mrs. Fuentes' son-in-law, Mr. Leon, for advice in the matter. (A. 28). Mr. Leon spoke English. (A. 28). Upon his arrival at the Fuentes home, he explained to the deputy that his attorney had told him that a court proceeding was necessary before the merchandise could be repossessed. (A. 28). The deputy then explained to Mr. Leon the pendency of the court proceeding and the effect of the writ. (A. 28). Mr. Leon then agreed that the deputy could repossess the stove and hi-fi; no objection or protest was raised by appellant or Mrs. Delgado. (A.28). The stereo was pointed out to the deputy as being in the living room and he was directed to the gas stove, which was located on an open porch outside of and at the back of the house. (A. 28). The stove and hi-fi were then removed from the premises in a truck. (A. 28).

On oral motion of appellant, the Dade County Small Claims Court continued the trial of the replevin action. (A. 40). She then filed her complaint in the court below for declaratory judgment and injunctive relief, attacking the constitutionality of Florida's statutory replevin act, §§ 78.01, 78.08, 78.10, 78.11 and 78.12, Fla.Stats. Firestone, not initially a defendant, was made a party defendant, along with Florida's Attorney General, to plaintiff's second amended complaint. (A. 7-13)³.

³The sheriff of Dade County and his deputy, who executed the subject replevin writ, originally made parties-defendant, were dismissed by order of the lower court. (A. 14).

Motions to dismiss filed by Florida's Attorney General and Firestone were denied, but Firestone's motion to strike all references to a class action in the second amended complaint was granted. (A. 44). The answers of Firestone and Florida's Attorney General essentially denied the material allegations of the second complaint. (A. 18-21, 45-48). Additionally, Firestone averred appellant's lack of standing to maintain the subject action and to attack the constitutionality of the questioned statutory provisions. (A. 47). Moreover, it averred that appellant voluntarily consented to the entry to her home and the replevying by the sheriff of the stove and hi-fi. (A. 47). Firestone also set forth the material provisions of the conditional sales contract between it and appellant, asserting appellant's default in payment for the merchandise and Firestone's right, pursuant to the contract, to repossess the subject personalty. (A. 47, 48).

The parties filed with the court below a stipulation of facts. (A. 23-43). An evidentiary hearing was held before the court for the purpose of allowing any party to adduce evidence of any material facts not covered by the stipulation or which were reflected by the stipulation to be in dispute. (A. 44, 73-102). No additional testimony was offered by appellant or the Attorney General; Firestone, however, adduced the testimony of two of its employees with respect to Mrs. Fuentes' past credit history with Firestone, the number and dates of written and oral notices to her of default in payment and the lack of any objection or protest to repossession raised by appellant to either the deputy sheriff or to employees of Firestone, who assisted the deputy in the physical removal of the chattels from the premises. (A. 79-89, 92-102).

In opposition to appellant's renewed motion for summary judgment, which was then pending before the court below, Firestone filed an affidavit of Vincent G. Morgan, Manager of Retail Credit for Firestone. (A. 50-61). After submission of briefs by all parties and amicus curiae, the lower court filed its opinion on August 21, 1970 holding that Florida's replevin statute "to the extent that its provisions were before the Court by virtue of an actual controversy in this case, is constitutional." (A. 62-68). The relief sought by appellant was denied and judgment ordered for appellees. (A. 68). Final judgment for appellees, from which this appeal is taken, was entered by the lower court on September 9, 1970. (A. 69, 70).

SUMMARY OF ARGUMENT

I

In both Sniadach and Goldberg this Court placed great emphasis upon the form of property involved and the drastic economic effects of depriving rightful recipients of its use even temporarily. The same facets of the secured sales transaction must be considered. At the time of repossession, a secured creditor has in fact a property interest in the collateral at least equal to the property interest of the debtor. The remedy of summary repossession diminishes the amount of loss for both creditor and debtor in a defaulted credit transaction. This factor, together with the reduced cost of summary repossession remedies, make it possible for credit to be extended to more people.

Removal of the summary remedy would inure to the detriment of high-risk credit borrowers, notably poor people. The extension or refusal of credit to all consumers, and more so to low-income consumers, depends to a large extent upon collateralization of the loan and summary availability of the collateral in the event of default.

Constitutional adjudication of the sort sought here is particularly unsuited to solving the problems of which appellant complains. The interests involved are not truly of constitutional dimensions; the alleged abuses appellant would have reformed are properly effected by legislation. The result appellant seeks could drastically affect the delicate balance of our consumer credit economy.

П

Appellant attempts to have extended to all replevin actions the procedures Sniadach and Goldberg announced

were necessary before family income could be substantially affected. Factually, this case and the vast majority of replevin cases do not result in a deprivation which is in any manner similar to that which occurred in *Sniadach* and *Goldberg*.

Prior to Sniadach and Goldberg, no decision of this Court had even implied that creditors' pre-judgment remedies violated procedural due process, because (1) property rights alone were involved, (2) opportunities to appear and defend were provided before the creditors' rights became final, and (3) the temporary loss of use of property was not determined a "taking of property" under the constitutional provisions. Sniadach and Goldberg each involved a peremptory termination of a family's "means by which to live." This Court relied upon the nature of the property affected and the results of the procedures in question. Pre-judgment creditors' remedies were distinguished.

No item of tangible personalty subject to replevin can constitute a "means by which to live" within the meaning of the term as used in Goldberg and implied in Sniadach. If Sniadach is applied to replevin actions, the Court must inevitably undertake to adjudicate, item by item, the procedural due process requirements as applied to every piece of personalty claimed to be necessary.

The modern statutory replevin remedy combines ancient and common law remedies for recapture of possession of personalty. It is a necessary adjunct to the existing law of secured transactions; it is the means by which the arm of the government is put into action to enforce legal property rights recognized throughout this country. Its very strong historical origin and its unquestioned,

widely accepted usage throughout the development of our economy together make a strong case for preservation of the remedy as it exists in every jurisdiction.

Neither the case made on the facts of the replevin here involved, nor the myriad of cases hypothetically argued, justify contorting the due process clause to achieve what might be proper legislative action. The rights of parties to secured transactions are properly balanced for constitutional due process purposes under the present statutory pattern.

Ш

Appellant is without standing to question the constitutionality of § 78.10, Fla.Stats. The authority granted the executing officer by that section to break open appellant's home, if, after public demand, she refused delivery of the property, was never invoked here. Both the entry and the repossession were entirely peaceable; in fact, there is no dispute that the deputy sheriff serving the replevin writ entered appellant's home on express invitation. No force was used. No forcible entry was made. Since the "breaking" authority of § 78.10, Fla.Stats., was never called upon to be utilized, there is no genuine and justiciable Fourth Amendment controversy. Moreover, the repossession being entirely peaceable, it was not an "unreasonable" seizure condemned by the Fourth Amendment.

Fourth Amendment restrictions have historically been defined in the context of criminal liability, actual or potential. Its extensions to civilly authorized inspections have still been limited by the recognition that such intrusions on privacy are for the purpose of discovering evidence which could lead to criminal prosecutions. This Court has expressly held and reaffirmed that the Fourth Amendment has no application to civil proceedings for the recovery of debts or to entries upon premises made by an officer of the law to seize chattels pursuant to a writ, such as attachment, execution or replevin. Replevin procedures are principally invoked to enforce valid private contractual rights. The fact that the aid of a sovereign is provided for that purpose by statute does not render Fourth Amendment proscriptions applicable.

The restraints against unreasonable searches and seizures are drastically relaxed where one is seeking to reclaim his property which is unlawfully in the possession of another. This is the basic predicate of statutory replevin procedures. Their long usage and judicial acquiescence imports to them the validity and efficacy under attack here.

By contract, Firestone retained title and right of possession to the stove and phonograph until full payment and was given the right to repossess in the event of any default in payment. This same right is inherent in the conditional sales contract under common law principles, which also recognized the right of peaceable entry and repossession, without judicial process. The Uniform Commercial Code adopted in all of the states except one, has codified this common law right as to secured transactions. Aid of a court officer in executing judicial process to enforce this right certainly does not impose the requirement of a search warrant. Appellant is without basis for constitutional complaint to the entirely peaceable repossession of the subject merchandise, pursuant to her own agreement.

ARGUMENT

POINT I

IN A SECURED TRANSACTION, DEBTOR'S INTEREST IN CONTINUOUS POSSESSION OF THE ITEMS OF COLLATERAL DOES NOT RESEMBLE IN FACT THE POSSESSORY INTEREST INVOLVED IN SNIADACH AND GOLDBERG.

While a number of interesting and important questions of law are presented here, one aspect of it makes this case enormously important to Firestone and to every other seller in the American economy that utilizes secured sales transactions. That aspect, of course, is whether the civil remedy existing in virtually every jurisdiction allowing repossession of collateral without the necessity of prior notice and adversary court hearings will be ruled unconstitutional on one ground or another. That result is sought by appellant on the theory, inter alia, that due process, under the Sniadach* and Goldberg's decisions, requires a court hearing before a secured seller may re-take possession of collateral upon which money has been loaned, notwithstanding the parties' contract and the state's statutory provision for immediate resumption of possession by the secured party. In both Sniadach and Goldberg, this Court placed great emphasis upon the form of property involved, and upon the crucial economic effects of depriving rightful recipients of its use even temporarily. It is appropriate here to examine the same facets of the secured sales transaction.

^{*}Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

⁵Goldberg v. Kelly, 397, U.S. 254 (1970).

At the end of World War II, outstanding consumer credit was just over $5\frac{1}{2}$ billion dollars, while at the end of 1968 the figure had climbed to over 113 billion dollars. Of the total consumer credit, installment credit has represented a large and growing percentage. The average outstanding consumer installment credit during 1970 was 98.72 billions of dollars; the volume at the end of May, 1971, stood at 100.7 billion dollars. Of total consumer installment credit, about 40% is automobile papers; about 25-28% is comprised of "Other Consumer Goods".

The average delinquency rate in 1966 for all types of installment credit was 1.76 per cent. Direct automobile loans had the lowest delinquency rate with 1.08%; the highest delinquency rates were recorded for FHA modernization loans — 2.41% — and for home appliance loans — 2.45% 10

Of all retail sales, approximately 70% are now credit transactions. (Affidavit of Vincent G. Morgan, A. 51). As total installment credit has grown, the terms on which it has been extended and the kind of borrowers to whom it is available have changed, too. In the 1920's more than 80% of automobile installment paper matured in 12 months or less; by 1965, 86% extended for periods of more than

⁶SA 10.

⁷Standard & Poors Trade and Securities Statistics, July, 1971, p. 6.

⁸Trends In Installment Credit, Prepared in 1967 for the Installment Credit Committee by the Department of Economics & Research, The American Bankers Association, p. 13, SA 9; Statistical Abstract of the United States, 91st ed., 1970. Dept. of Commerce, Bureau of the Census p. 451, SA 12.

⁹Ibid.

¹⁰Trends In Installment Credit, supra, at 35, SA 8.

two and one-half years. Down payments have become increasingly smaller in terms of percentage of purchase price.¹¹

As the terms have become less restrictive, debt holding has increased throughout the population. Credit has become available to poor people, to the extent that in 1960, 24.8% of all households with annual income under \$1,000.00 owned automobiles.¹² In 1969, 44.7% of all households with annual income under \$3,000.00 owned automobiles.¹³ The statistics are equally impressive for ownership of television sets, refrigerators, and to a lesser extent washing machines, clothes, dryers, and so forth. (*Ibid.*) Low income families to a substantial degree utilize credit transactions to acquire their relatively expensive possessions. The families studied in *The Poor Pay More*¹⁴ reported:

"Table 7.1 — Method of Payment for Major Durables
(In Per Cent)

Method of Payment	Furniture at move	Furniture since move	TV	Phono- graph	Sewing machine	Vacuum	Washing machine
Store and peddler credit	66	53	64	59	59	61	55
Cash borrowed	3	5	4	4	3	4	8
Cash savings	31	42	32	37	38	35	37
Total per cent	100	100	100	100	100	100	100
Total cases*	(297)	(203)	(322)	(155)	(108)	(79)	(132)
Those who did	not buy	applian	ces from	n a con	mercial	source	or who

"Those who did not buy appliances from a commercial source or who did not answer the question on method of payment are excluded from the table."

¹¹Moore & Klein, The Quality Of Consumer Installment Credit (1967), p. 146.

¹²Statistical Abstract of the United States, supra, at 327, SA 11.

^{134.7%} owned two or more automobiles. Ibid.

¹⁴Caplovitz, The Poor Pay More (1963), p. 96.

It is important to note that, while the majority of these low income families utilized credit to obtain the items described, a substantial percentage managed to do without them until sufficient cash had been saved to purchase outright. Appellant's claim that temporary use of items such as these is "crucial" in the same way as wages or welfare, is appreciably weakened by the fact that a third or more of low income families don't have possession of them at all until sufficient money is saved to pay their entire purchase price. People don't "do without" wages the way they can "do without" things.

The existence and nature of creditors' remedies influences the extensions and collections of consumer credit. Traditionally, the criteria for extension of consumer credit have been called the "three 'C's" Capacity, Character, and Collateral. For poor persons, who have a relatively small "capacity" to pay installment debts, it is readily seen that "collateral", and its availability in the event of default, is an especially important criterion in determining whether poor people will be extended credit or not.

Much of the flavor of appellant's argument develops from "the archetype of the creditor as rapaciously eager to repossess, to profit hugely by resale and otherwise to oppress the debtor". This conception is an "archmyth", Professor Kripke says. "(I) t is accepted that repossession

¹⁵Wenk and Moye, "Debtor-Creditor Remedies: A New Proposal", 54 Cornell L. Rev. 249, 254.

¹⁶Kripke, "Consumer Credit Regulation: A Creditor-Oriented View-point," 68 Colum. L. Rev. 445, 448 (1968).

^{17&}quot;Even if every dollar of principal and finance charge is ultimately realized by collection, an account that requires individual collection handling yields a loss. When expectations are defeated, the creditor no doubt tries to collect, with greater or lesser zeal; but that a creditor of institutional size deliberately walks into a collection struggle at the inception of credit is to this writer unbelievable." Ibid.

of consumer goods will almost invariably result in loss to the retailer" (Affidavit of Vincent G. Morgan, A. 52) Resale markets are so poor that the alleged resale profits are a fantasy.¹³

"In the event of repossession, these goods must be sold in what is at best a thin market due to the strong consumer preference for newness per se, technological improvement resulting in rapid obsolescence of the goods, normal wear and tear of the goods in the purchaser, abused goods or the suspicion that the goods may have been misused, rendering their fitness questionable, loss of new good warranties, etc. . . . after recognition that repossession is the only course available, it is imperative that repossession not be delayed in order that the salvage value of the goods can be realized and applied to the indebtedness." (Affidavit of Vincent G. Morgan, A. 53)

Mr. Morgan analyzed the four principal factors which control or limit the percentage of loss on repossessed merchandise:

"(a) Probably the most important factor is that in the vast majority of cases of default, the debtor will voluntarily return or surrender the merchandise. The inducement for this voluntary return is the debtor's appreciation that the creditor has the legal right to recapture the goods promptly in any event, supported by his desire to avoid legal expense, and, in some cases, loss of credit rating.

¹⁸Kripke, supra, at 68 Colum, L. Rev. 448.

- "(b) The next most important fact is that under our present credit system the creditor has an effective means of recovering the goods and liquidating the indebtedness in some approximate relation to the rate at which the collateral depreciates. Stated in other words, in a percentage of credit sales, which is particularly high among low income 'high risk' credit purchasers, the retailer must look solely to his goods now in possession of the purchaser as security for payment on their price. . . .
- "(c) The third factor . . . is that the money realized by resale . . . can be reinvested in income producing goods, thereby offsetting a portion of the remaining loss.
- "(d) The fourth factor which controls the rate of loss on repossessed goods is the fact that, whether voluntarily returned or recovered by the use of summary process, the goods can be recaptured without expenditure of substantial legal fees and court costs, which, in some cases, exceed the retail cost of the goods, and are never entirely recoverable even after judgment." (A. 52-53)

Especially when low income persons seek credit, then, its extension or refusal will depend to a large extent upon collateralization of the loan and summary availability of the collateral in the event of default. In these circumstances, the creditor's interest in the chattel is more than an illusory legal fiction; it is a property interest in fact as well as in law. In secured loans which go into default,

the security is creditor's only real hope of minimizing loss. The defaulting debtor has had the use of the article during the life of the contract, and his use has invariably caused the collateral to diminish in value. Debtor's possession and use is not unconditional: to the contrary, it is in virtually all jurisdictions subject to a secured creditor's right to resume possession upon default under the contract terms.19 The right to possession and use of collateral is thus much different from the right to possession and use of wages. Before judgment, an unsecured creditor has no "property" in debtor's wages, while debtor has earned the wages and owns them entirely until such time as execution issues on a judgment.20 By contrast, a secured creditor has both a legal and a property right in possession of collateral upon default. The extent of the property right is graphically demonstrated by automobile repossession experience.

It has been noted above that automobile loans represent about 40% of all consumer installment credit, and that the length of installment obligations on automobiles are for the most part in excess of two and one-half years. (Supra, p. 15-16) On a 24-month loan, the outstanding balance of a loan is greater than the wholesale value of the car for the first 9¼ months of the loan. During that period the lender assumes the greatest risk since he is not likely to recover the outstanding balance if the car is repossessed and sold. With a 36-month loan, this period of risk exposure is extended to 22 months; on a 42-month loan the period lasts 25 months; and on a 48-month loan, for

¹⁹See discussion, in/ra, p. 56, on the existence of summary repossession rights in all jurisdictions except Louisiana by virtue of the Uniform Commercial Code,

²⁰Even then, they may be exempt, if the wage-earner is head of a household. E.g., Fla. Stats. §222.11.

32 months.²¹ Of all automobiles repossessed, more than half are repossessed within the first year.²² The percentage fluctuates, being as high as 89% from 1953 to 1955.²³ During the latter period, 34.3% of all auto repossessions occurred during the first three months after sale, and an additional 26.0% during the succeeding three months. (*Ibid.*)

The point is obvious: creditors often have a property interest in their security which is greatly in excess of the debtor's. Considering the fact that automobiles are highly susceptible to destruction in the course of their ordinary use, with or without fault on the debtor's part, the necessity for summary repossession remedies is intensified. In varying degrees, the rationale applies to almost all forms of personalty. As the gross value of the article diminishes, the relative damage to creditor increases due to use of the collateral and loss of value by passage of time; accordingly, if the relief is delayed, it may become worthless.²⁴

²¹Trends in Installment Credit, supra at 34; SA 7.

²²McCracken, Mao & Frickle, Consumer Installment Credit and Public Policy (1965), p. 129; SA 13, 14, 15.

²³Moore & Klein, The Quality of Consumer Installment Credit, (1967). p. 221-222; SA 17.

²⁴The contention is not made here that appellant would have absconded with the items involved, or that she would have intentionally destroyed them — just as no contention is made that Firestone caused replevin to issue to enforce collection of a fraudulent debt. To the extent that appellant argues that there are creditors who abuse creditors' remedies, it should be noted that there are debtors who destroy or steal collateral rather than have it repossessed. The procedural change appellant seeks would leave creditors without a means to protect their interests in such cases. Unlike debtors who have an action against creditors for wrongful use of process, which can in most cases be reduced to judgment and satisfied, creditors would be remedyless as a practical matter if summary repossession were precluded.

If every repossession becomes a case for courts and lawyers, the cost to creditors of collection will increase due to delay (resulting in lower value of repossessed goods) and litigation expenses.

"A fallacious impression which should be corrected is that business can or will absorb this additional cost in its existing profit margins. Many industries (such as the tire industry which has had an historical profit level of 31/2%) simply cannot absorb this cost in their present profit margins. With respect to other industries, it is axiomatic that the motive of maximizing profits is implicit in an entrepreneur economy, which is epitomized by retailing. Such industries, already caught between increased material, money and labor costs and a quiescence in retail purchasing, will not absorb this cost, but will pass it on to the consumer in the form of increased prices in consumer durables. The basic economics involved predetermines this result." (Affidavit of Vincent G. Morgan, A. 56-57) 25

Nor is the situation likely to be different in the already overpriced low income market. Study of the Washington, D. C., low income retail market shows that despite higher mark-ups and gross profits, so-called "ghetto retailers" do not return appreciably higher net profits. Indeed, rate of return on stockholders' equity, after taxes, was below

²⁵With a credit limit in Florida and most states, the cost of credit itself does not leave the room for profit in lending that some suspect. A recent study by National Retail Merchants Association, "Economic Characteristics of Department Store Credit", page 59, found that the enterprises studied had total credit costs in excess of total service charge revenue by 3.41% of credit sales. Some cost factors are enumerated at A. 52.

most "general" market retailers. Bad debt loss experience of low income retailers was found to be about 20 times that of "general" market retailers; it accounted for about one-fourth of the total difference in gross margins. If the retail lender is lending at only one rate to nearly all of his customers (as the consumer finance companies are) and he is losing money, the obvious solution is to discard his lowest stratum of risk—those who have the worst payment record, the most tenuous and uncertain employment, etc."

Thus, as Mr. Morgan's affidavit states: "Anyone who has seriously thought through the economic implications of this case would appreciate that continuance of the remedy of summary repossession is advantageous to all consumers, and absolutely essential to consumers such as [appellant]." (A. 55)29

²⁶"The Economic Report on Installment Credit and Retail Sales Practices in the District of Columbia", reported in Hearing before the Sub-Committee on Financial Institutions of the Senate Committee on Banking and Currency—90th Cong. 2nd Sess., April 19, 1968. SA 6. See analysis of Professor James J. White, "Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study, The Business Lawyer (Special Issue 1969), p. 147-151.

²⁷ The Economic Report on Installment Credit, etc.", supra, Table II-5. SA 5.

²⁸White, "Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study", supra, at 145.

²⁹If credit from legitimate sources cannot profitably service the low income market, that effect inures to the benefit of black-market creditors, the loan sharks. The modern view is to open the high risk credit market to legitimate lenders, and not to encourage resort to the "six for five" lenders. Seidl, "Let's Compete With Loan Sharks", 48 Harvard Business Reviaw (May 1970), p. 69. "Six for five" describes small loan sharks repayment "schedules"; reference is to an interest rate which returns six dollars on a five dollar loan for one week or an effective annual rate of 1.040% interest per year. Ibid. Cj. "An Empirical Study of the Arkansas Usury Laws: With Friends Like That . . . " Vol. 1968 No. 4 U. Ill. Law Forum 544.

The relief appellant seeks here results from a well-intentioned, but misdirected attempt to correct what she conceives to be abuses of creditor remedies. But her complaints do not really touch the substance of the replevin remedy itself. "This is not to say that there may not be individual remedies like wage assignments which should be curbed, but curbing remedies as a general approach is wrong. It confuses the areas of oppression of the consumer with universal practice."30 A "cure" aimed at one malady, but which has impact on all cases cannot fail to cause problems. (Ibid.) The basic problem has not been reached. Appellant has endeavoured to make this case conform to the problems presented by Sniadach and Goldberg, Camera and See. While there are admittedly and Goldberg, Camera and See. While there are admittedly broad and general similarities between this case and those, there are "centrally distinguishing and compelling facts"11 which set them apart. One is apparent from the nature of the secured credit transaction, and the respective "property" rights of parties to it. It is demonstrable that the present statutory replevin scheme properly balances the interest of debtor and creditor in such transactions: and at the same time attends to a compelling state interest in the peaceful and orderly settlement of commercial disputes.

Before dealing with this case directly in the context of constitutional precedent, it is worthwhile to briefly note some other economic implications of discarding the summary repossession remedy. To retailers carrying their own accounts, the additional expense of changed repossession procedure would result in changes in credit ex-

³⁰Kripke, "Consumer Credit Regulation: A Creditor-Oriented Viewpoint," supra, at 478.

³¹Epps v. Cortese, 326 F.Supp. 127, 133 (E.D.Pa. 1971)

tension practices. However, to the retailer who for one reason or another discounts his accounts, the change in creditor-debtor balance could result in an increased discount rate, or in recourse to the retailer for bad debts and credit charges. Profits on credit sales would be diminished across the board, and eliminated in the case of some. Retailers' endorsement of three party credit card transactions, as with banks, would undoubtedly be required. Inventory financing and other secured lending practices which can quickly go awry, would be limited by loss of these summary remedies.

Credit availability is delicately and responsively interrelated with virtually every facet of our economy. The implications of disturbing the balance must be considered. Some possible ramifications are: unreasonable restriction of credit; increase in price of retail durables, contributing to inflation; increases in "loansharkism"; further disparity in ghetto gross profit margins; and credit to low and lower median income ranges would be restricted. (Affidavit of Vincent G. Morgan, A. 59) Any decline in total retail sales would have economically predictable results on unemployment and cyclic effects incident to that condition.

When made the basis for attack on a practice and remedy of long standing, the problem of Mrs. Fuentes' stove and hi-fi takes on enormous proportions. It is respectfully contended that the problem is one particularly suited for legislation. The result urged by appellant would seriously weaken an important part of the foundation of our credit economy. If the problem is not one which compels constitutional adjudication, it should be left to the state legislatures and Congress for solution. The precedent appellant relies upon by no means compels adoption of any such constitutional principle.

POINT II

PROCEDURAL DUE PROCESS IS AFFORDED TO BOTH PARTIES TO A SECURED TRANSACTION UNDER EXISTING REPLEVIN PROCEDURES, PROVIDING FOR THE RIGHT OF PLAINTIFF'S TEMPORARY POSSESSION UPON GIVING BOND, THE RIGHT OF DEFENDANT TO RE-TAKE POSSESSION PENDING TRIAL UPON GIVING EQUAL BOND, AND THE RIGHT OF TRIAL UPON THE ISSUE OF PERMANENT POSSESSION.

A. Sniadach and Goldberg, in the context of this court's procedural due process decisions, do not require prior notice and adversary hearing before pre-judgment replevy of tangible personalty.

Appellants' due process contentions are founded almost entirely upon this Court's rulings in Sniadach³² and Goldberg³³ that due process under the United States Constitution requires notice and hearing before a family's sole source of income may be terminated or withheld. By this action, appellant attempts to have extended to all replevin actions the procedures Sniadach and Goldberg announced were necessary before family income could be substantially affected.

³²Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

³³Goldberg v. Kelly, 397 U.S. 254 (1970).

In Sniadach, Family Finance Corp. instituted a garnishment action against Christine Sniadach and her employer, before its claimed debt had been reduced to judgment. Pursuant to Wisconsin statute, Sniadach's employer withheld one-half of the pay due her, subject to order of court, and paid her the balance of the earned wages. This Court found the procedure invalid, requiring that notice and hearing precede pre-judgment wage garnishment.

"We deal here with wages — a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

'The idea of wage garnishment in advance of judgment, or trustee process or wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level.'

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." (Footnotes omitted) 395 U.S. at 340-42.

Goldberg presented the question whether "a State that terminates public assistance payment . . . without affording . . . opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process. . . ." 397 U.S. at 255. This Court quoted the District Court with approval:

"'While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets, . . . Suffice it to say that to cut off a welfare recipient in the face of . . "brutal need" without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.' 397 U.S. at 261.

"... For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus, the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible [emphasis by the Court] recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate." (Footnotes and citations omitted) 397 U.S. at 264.

In Sniadach and Goldberg, there were involved social relationships between and among the parties which are materially different from the relationship which exists between Mrs. Fuentes and Firestone. In Sniadach, a creditor, whose claim was not reduced to judgment, was able by statute to intervene in the relationship existing between Christine Sniadach and her employer; by statutory process, the creditor could cause wages, which had been earned and

were due an employee, to be withheld pending rendition of judgment on creditor's claim. The wage-earner and his or her dependents were deprived of the wages in the interim.

In Goldberg was involved an aspect of the relationship between government and governed in a beneficient society. Much law review commentary³⁴ and increasingly judicial decisions have postulated procedural due process in the government-welfare recipient relationship. So it was in Goldberg, a case involving the termination of government benefits which constitute "the very means... to live..."

In both Sniadach and Goldberg, the crucial factor was the necessity to maintain a source of income for survival; in neither case was there involved a private contract remedy, involving specified items of personalty, which was consented to at the time of creation of the original debt. Neither decision arose out of facts even remotely analogous to the entire body of consumer credit transactions, namely that one acquires the use and enjoyment of personal property on the condition that he pays for the property and further conditioned on the right of the seller to reclaim possession of the goods when payments are not made. In Sniadach the property garnished was unquestionably that of Mrs. Sniadach; Family Finance claimed no title to it nor even the right to possession of it. In Goldberg, the property was public funds; the issue was one of "entitlement", a concept applicable in the government-governed relationship. Neither case deals with the respective rights of private parties to enforce contractual agreements about

³⁴Notably, the writings of Professor Reich, often cited by this Court: Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245 (1965) Reich, The New Property, 73 Yale L.J. 733 (1964).

possession of specified items of personal property.³⁵ In this case, the parties contracted that the seller retain both "title and right of possession of [the] merchandise" and that "in the event of default in any payment or payments, seller... may take back the merchandise..." (A. 32, 34).

In Sniadach and Goldberg, the Court carefully distinguished cases involving attachment of wages from attachments "in general" and cessation of welfare payments from "virtually anyone else whose governmental entitlements are ended". The facts of the present case are quite different from the facts in Sniadach or Goldberg. Instead of loss of use of family income, appellant has temporarily lost use of a disconnected stove and a hi-fi. So it is in every replevin action that the property involved does not constitute the entire means to live, rather the procedure is limited by definition to use in retrieving specified items of personalty.

The validity of numerous kinds of pre-judgment attachments has been questioned before this Court. Uniformly, this Court has ruled that where ordinary forms of property are involved, the procedure of attachment before judgment does not violate the due process requirements of the United States Constitution. Only in *Sniadach* has a

³⁵In National Equipment Rental v. Szukhent, 375 U.S. 311, 315 (1964), against due process attack, the Court sustained a private contract provision by which "a private party... appoint[ed] an agent to receive service of process..., where the agent [was] not personally known to the party, and where the agent [had] not expressly undertaken to transmit notice to the party." Defendant had actual notice of suit from the agent.

³⁶Sniadach, 395 U.S. at 340.

³⁷ Goldberg, 397 U.S. at 264.

similar procedure been found deficient, and then only on the premise that a special form of property was involved wages, the very means of livelihood.

Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950), involved the statutory power under the Federal Food, Drug and Cosmetic Act [21 U.S.C. §334(a)] to administratively seize a misbranded article, "When the Administrator has probable cause to believe from facts found without hearing, . . . that the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer." Id, at 595-96. There was no claim by the Administrator that the ingredients of the preparation seized were harmful or dangerous to health. The sole claim was that the labeling was misleading, and the product thus "misbranded". Ibid. Mr. Justice Douglas' opinion for the majority upheld the power to seize without notice or hearing, saying (Id, at 599-600):

"It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. Phillips v. Commissioner, 283 U.S. 589, 596, 597, 75 L.Ed. 1289, 1296, 1297, 51 S.Ct. 608; Bowles v. Willingham, 321 U.S. 503, 520, 88 L.Ed. 892, 906, 64 S.Ct. 641; Yakus v. United States, 321 U.S. 414, 442, 443, 88 L.Ed. 834, 859, 64 S.Ct. 660.

". . . A requirement for a hearing, as a matter of constitutional right, does not arise merely because the danger of injury may be more apparent or immediate in the one case than in the other. For all we know the most damage may come from

misleading or fraudulent labels. That is a decision for Congress, not for us. The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing. We cannot say that due process requires one at that stage."

Thought it was agreed the product was not harmful, the Court refused to invalidate seizure without notice and hearing even though "irreparable damage" could result. Id. at 599. There was no contention that an emergency existed which required summary action.

In Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928), provisions of the Georgia Banking Act were challenged which allowed levy of an execution lien upon property of bank stockholders, when stockholders did not respond to the assessed value of their stock to pay depositors of a defunct bank. The execution lien constituted a lien upon stockholders' property, and that procedure was challenged as a denial of due process because no prior notice and hearing were afforded before the execution lien attached. There was no reliance by the Court on any emergency to justify seizure. Mr. Justice Holmes' opinion was that:

"... (t) he stockholders are allowed to raise and try every possible defense by an affidavit of illegality, ... A reasonable opportunity to be heard and to present the defense is given ... The fact that the execution is issued in the first instance by an agent of the state but not from a court, followed as it is by personnal notice and a right to take the case into court is a familiar method in Georgia, and is open to no objection.

"As to the lien, nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit." Id, at 31

In Phillips v. Commissioner, 33 U.S. 589, 596-97 (1930), Mr. Justice Brandeis stated, in his opinion for the Court:

"Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of the liability is adequate." 38

Cases have been before the Court in which pre-judgment seizure of property was done with some urgency; but it has never been held that pre-judgment levy is available only in emergency conditions. In North America Cold Storage, supra, the Court expressly refused to limit seizure of putrid food to emergency cases, leaving the matter to legislation. Id, at 320. It was contended there without success that due process required a hearing before summary destruction of the food, when the food could have been preserved without any change in its disputed condition.

Appellant has argued that due process has rigidly required no one be deprived of "property" by state action unless first given notice and opportunity to be heard (Ap-

³⁸The statement quoted with approval in 300 West 154th Street Realty Co. v. Dept. of Buildings, 260 N.E.2d 524 (C.A.N.Y. 1970).

³⁹E.g., Fahee v. Mallonee, 322 U.S. 245 (1947), North America Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

pellants' Brief p. 14); and that pre-judgment levies have constituted an exception to this principle only under rare conditions. As appellant would have it apply to the present case, this position is untenable. To the contrary, this Court has accorded to the term "due process" a flexible definition:

"'"[D]ue process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions. ..."***

Due to the "state action" element of due process, most analogous cases which have reached this Court have involved governmental levy or seizure. The efficacy of pre-judgment levy was successfully challenged only when the statutory scheme allowed of levy and disposal of property without notice to the owner and an opportunity to raise defenses before the proceeding became final. This Court has considered the due process validity of pre-

⁴⁰Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961), quoting concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341, U.S. 123, 162, 163. Likewise, F.C.C. v. WJR, The Goodwill Station, 337 U.S. 265 (1948). Also see Ownbey v. Morgan, 256 U.S. 94 (1921).

⁴¹Ewing, Coffin Bros.. Phillips, Fahee, North American Cold Storage, supra; Murray v. Hoboken Land & Improvement Co., 18 How. 272 (1856), Security Trust v. Lexington, 203 U.S. 323 (1906), Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915).

⁴²Coe v. Armour Fertilizer Works, supra, at 422-23. To the same effect, but in proceedings not involved with levy on property, "process" which did not provide for notice to the defendant was invalidated in Armstrong v. Manzo, 380 U.S. 545 (1965), and Wuchter v. Pizzutti, 276 U.S. 13 (1928).

judgment levy by private action only in Sniadach and McKay v. McInnes, 279 U.S. 820 (1929). In McKay the procedure was approved per curiam. Sniadach did not reverse McKay; the doctrine embodied in McKay simply was held not to apply to pre-judgment wage garnishment.

The procedure available under Maine's attachment statutes, attacked on due process grounds in McInnes v. McKay** allowed pre-judgment levy upon the real and personal property of defendant, — without notice, hearing or bond — to provide security for judgment which might subsequently be entered. The remedy was not one to determine right to possession of specific chattels; it was available to attach all property of defendant in order that any judgment for plaintiff could be satisfied. It is not evident from the statute whether personalty was physically removed from defendant's possession, but language of the Maine Supreme Court indicates that it was:

- "... a plaintiff could take out either a summons or attachment against the defendant and... since if the goods were *released* on appearance the plaintiff, recovering judgment, might not find them to seize on execution that the attachment should remain until judgment was satisfied,..." 141 Atl. at 701:
- "... Until a sale on execution, the debtor has full power to sell or dispose of the property at-

⁴³Ownbey v. Morgan, supra, involved pre-judgment attachment, but it is clear that the decision there was based on the fact that the procedure enabled jurisdiction quasi-in-rem to be acquired over a non-resident. Jurisdiction of a non-resident is not involved here, nor is it claimed to be involved in repelvin actions generally.

⁴⁴¹⁴¹ Atl. 699 (Me. 1928).

tached without disturbing the possession (in case of personalty) or rights acquired by attachment." 141 Atl. at 702

The Maine Supreme Court held the pre-judgment attachment procedure valid, over objections based solely upon due process.

"The usage and practice, therefore, of instituting suit by . . . attachment . . . had become fully established . . . at the time of the adoption of the Federal Constitution.

"All acts of the Legislature are presumed to be constitutional and it is a presumption of great strength. That a statute or rule of law, or custom has so long existed, unquestioned, and has been so often invoked, and universally approved, and has become ingrained like this in the jurisprudence of a state, is a strong, if not conclusive, reason for pronouncing it constitutional . . .

"But we think it is clear that the attachment statute does not deprive the defendant of property without due process of law.

"... although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of the debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation

of property contemplated by the Constitution. And if it be, it is not a deprivation without due process of law for it is a part of a process which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied." 141 Atl. at 702-03.

This opinion was affirmed, per curiam, in the Supreme Court of the United States. 45 McKay was cited in Sniadach for the proposition that procedures can be constitutionally acceptable for attachments "in general" and not necessarily be acceptable when dealing with wages — a "specialized type of property", (395 U.S. at 353).

In context, then, Sniadach does not hold that "due process" requires notice and hearing before every prejudgment levy, except when there is some compelling governmental interest. To the contrary, Sniadach specifically excluded "attachments generally" from its consideration. The replevin procedure, which is for due process purposes no different than Maine's attachment procedure, is a constitutionally acceptable procedure within the meaning of this Court's per curiam affirmance of McKay. Examination of the facts here demonstrate the wisdom of distinguishing between wages and personal property.

It cannot be gainsaid that people working for wages, in nearly all instances, need those wages to live above the poverty level. Money is the medium used to convert labor into all the physical necessities of life. When one is de-

⁴⁵²⁷⁹ U.S. 820 (1929).

prived of wages, by any means, the likely result is an inability to function successfully in our economic system. Very few things can happen which are fairly comparable to loss of wages — loss of employment, loss of shelter are perhaps similar. Appellant is not before this Court attempting to protect her wages, however, or her employment, or the roof over her head; she is here saying that her hi-fi and a disconnected stove are entitled to the same constitutional treatment as Mrs. Sniadach's wages.

Undaunted by the disparity between wages and a hi-fi, appellant additionally contends that "attachments generally" must be treated in the same manner as wages. Perhaps because of the facts of this case, appellant's attack is on the replevin statutes on their face.46 (Jurisdictional Statement, p. 3). The contention is not that appellant's hi-fi or her stove were so important that the temporary loss of use of them "as a practical matter (drove) a wage-earning family to the wall." It is not contended that "attachments generally" would have that effect, or that replevy "compels the wage earner, trying to keep his family together, to be driven below the poverty level." 395 U.S. 353. The argument is that there are items of personalty, temporary loss of use of which could cause hardship. Therefore, the entire statutory scheme must allegedly fall.

⁴⁶The facts of this case present almost none of the problems appellant sees in the statutory procedure. The lower court's upholding of Florida's pre-judgment replevin statutes was "to the extent that its provisions were before the Court by virtue of an actual controversy in this case." 317 F.Supp. at p. 959. This Court has often said it would not undertake sweeping constitutional adjudication in such cases, e.g. Wyman v. James, 400 U.S. 309 (1971). Nevertheless, the broad implications of any ruling on these facts compel argument of the various points appellant raises.

Even if it be assumed that certain items of personalty are important to daily life, none has been suggested yet which is "the very means by which to live." This criterion was "crucial" to the Goldberg decision; the same consideration was discussed extensively in Sniadach, where the "nature of the property" determined the requirements of procedural due process. 395 U.S. 340. Loss of use of an item or items of personalty does not present the same or similar problems.

The three-judge District Court below decided that Sniadach and Goldberg did not require notice and hearing before pre-judgment replevy in Florida; the three-judge panel convened to rule on the Pennsylvania replevin procedures ruled likewise.

"Admittedly, there are broad and general procedural similarities between those cases [Sniadach and Goldberg] and the instant case; however, both have centrally distinguishing and compelling facts which make them inapposite to the case before this Court. . . . The Court emphasized the unique characteristics of wages as a 'specialized type of

⁴⁹Epps v. Cortese, 326 F.Supp. 127 (E.D. Pa. 1971), prob. juris. noted 402 U.S. 994 (1971).



⁴⁷This Court's characterization of welfare payments in Goldberg, 397 U.S. at 264.

⁴⁸"In sum, we think that despite Sniadach and Kelly there are still situations in which pre-judgment seizure of goods without a prior hearing is valid, see Sniadach, 395 U.S. 340, 89 S.Ct. 1820, and that replevin pursuant to a contract which authorizes a conditional seller to repossess in order to protect this security interest in the good which are the subject of the contract is one of those situations." Fuentes v. Faircloth, 317 F.Supp. 954, 958 (S.D.Fla. 1970).

property presenting distinct problems in economic system'. (Emphasis added) 395 U.S. at 340. To refer to wages as a 'specialized type of property' is to understate the difference between wages and all other types of property. To refer to wages as 'presenting distinct problems in our economic system' is to again understate the wholly unique problems incident to seizure of wages as opposed to all other types of property. They are the means or medium by and through which the necessities of life are purchased.

"... In contrast, the creditor here seeks specifically identifiable property to which he has reserved title and which he nows seeks in order to prevent its loss, concealment or destruction." 326 F.Supp. at 133. (Emphasis by the Court)

The Tenth Circuit Court of Appeals applied the "specialized type of property" test in a replevin action; it also refused to extend *Sniadach* to a case involving enforcement of a contractually created security interest.⁵⁰ Other courts have reached similar conclusions.⁵¹

A contrary result was reached by the three-judge court in New York, which held that state's replevin procedure

⁵⁰Brunswick Corporation v. J & P Inc., 424 F.2d 100 (10th Cir. 1970).

⁵¹McCormick v. First National Bank of Miami, 322 F.Supp. 604 (S.D. Fla. 1971), repossession under U.C.C. §9.503; Young v. Ridley, 309 F.Supp. 1308 (D.C. 1970), mortgage sale: Robinson v. Loyola Foundation, Inc., 236 So.2d 154 (Fla.App. 1st 1970), attachment; Wheeler v. Adams Co., 322 F.Supp. 645 (D.Md. 1971), replevin; Lawson v. Mantell, 306 N.Y.S.2d 317 (Sup.Ct. 1969), replevin.

unconstitutional⁵² on due process grounds, inter alia, by extending the Sniadach and Goldberg decisions.

"Two problems with the LaPrease decision are readily apparent. First, by extending the protection of Sniadach to other 'specialized' types of property, the decision creates a line-drawing problem of frightening dimensions. If refrigerators, stoves, and beds are 'necessities' deserving special treatment, do chairs and carpeting merit the same? According to what rationale might such distinctions be made? Second, to the extent that the decision relies on Goldberg v. Kelly, such reliance appears to be misplaced. Balancing a welfare recipient's interest in maintaining an income prior to a hearing against the governmental interest in avoiding potentially unnecessary expenditures is distinguishable from the tension between the interests of a seller and a buyer. In the former situation, the government is surely the party financially better able to bear any temporary in-

⁵²LaPrease v. Raymours Furniture Co., 315 F.Supp. 716 (N.D.N.Y. 1970). To much the same effect is Westinghouse Credit Corp. v. Edwards, Common Pleas Ct. of Detroit, Mich. (Appendix F to Appellant's Reply to Motion to Dismiss or Affirm). Of the cases in which Sniadach has been extended, most have involved seizures which differ in some material respect from the replevin procedure: Hall v. Garson, 430 F.2d 450 (5th Cir. 1970), landlord's lien statute authorizing summary seizure of all household belongings; Klim v. Jones, 315 F.Supp. 109 (N.D. Cal. 1970), Innkeeper's lien law under which all of tenant's belongings, including the tools of his trade and all his clothes, were locked up in his room without notice; Santiago v. McElroy, 319 F.Supp. 284 (E.D. Pa. 1970), landlord distress statute under which tenant's entire household belongings may be taken and sold within five days, unless tenants posts bond and replevies; Swark v. Lennox, 314 F.Supp. 1091 (E.D. Pa. 1970), confession of judgment statute; Mihans v. Municipal Court, 7 Cal. 3d 497, 87 Cal.Rptr. 17 (1st App.Div. 1970), eviction writ without notice.

equity prior to a hearing; furthermore, it has the power to shorten the period of time prior to such a hearing and thus to minimize expenditures which subsequently prove unwarranted. Less convincing is the assumption that seller must necessarily bear the risk of the possible loss, damage, or depreciation of property while he waits for his action against the buyer to be called on a congested court calendar over which he has no control." Comment, LaPrease and Fuentes: Replevin Reconsidered, 71 Colum. L. Rev., 886, 896 (1971).

Though the LaPrease court opined that some articles of personalty are "necessities" for ordinary day-to-day living, and thus within the scope of Sniadach, there is no explanation why this conclusion requires prior notice and hearing before every replevin. If there is a provision of the United States Constitution which is violated by pre-judgment replevy of a hi-fi set, or any other chattel which is not even arguably "necessary" for human life, then it has gone unnoticed for very many years. If any such provision were either express or implied in the Constitution, it would render unnecessary the discussion in Sniadach and in Goldberg about the "crucial" nature of family income vis-a-vis procedural due process. If there is no provision of the United States Constitution which forbids pre-judgment replevy of non-essential personalty, then surely, a statutory replevin procedure cannot be unconstitutional on its face.53

^{53&}quot;To what actions the remedy of attachment may be given is for the legislature of a State to determine and its courts to decide . . . "Rothschild v. Knight, 184 U.S. 334, 341.

If Sniadach and Goldberg are extended in any way to pre-judgment replevin cases, this Court will be faced with the enormous task of defining, almost by item, which cases will require notice and hearing before replevy. No standard could be devised which would successfully delineate protected items. The concept is susceptible in the end only of subjective item-by-item decision; it could be authoritatively delimited only by this Court, since it would be said to take root in the United States Constitution. The process of definition would require years, and the replevin procedure would be virtually useless in the interim. Usage of the remedy in transactions entirely between business organizations further complicates the problem. In some cases, replevin could put an enterprise out of business.54 Would that effect make prior notice and hearing necessary? Replevy of inventories of small or poor businesses could terminate their ability to operate. Would the rights of business organizations be protected differently by the due process clause?

For constitutional adjudication, it is not enough to say that the consumer credit system has ills; or that stautory creditors' rights are sometimes abused by unscrupulous merchants. The area is one which requires legislation for solution; it is not susceptible of reform by procedural requirements which appellant seeks here. 55 Indeed, it appears that judicial alteration of the system could inure to the

⁵⁴E.g., Brunswick Corporation v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970), in which bowling alley equipment was attached.

⁵⁵In Connecticut, legislation has been passed prohibiting creation of security interests in certain items of personalty, a very workable legislative solution to the problem of which appellant complains, but one which does not require the "overkill" of constitutional adjudication. See, Conn. Gen. Stat. Ann. §42a-9-209 (Supp. 1965).

detriment of consumers like appellant. Certainly it is not appropriate to contort the due process clause to achieve what might be proper legislative enactments.

"The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement, and with provision against every possible hardship that may befall. . . . However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy." Ownbey v. Morgan, 256 U.S. 94, 110-11 (1921).

The present legislative scheme is one which does not deprive replevin defendants of a "substantial property interest" within the meaning of the due process clause. Nor do the statutory enactments, which include service of a pre-judgment writ of replevin, fail to provide defendants with due process of law. The remedy as it exists in almost all jurisdictions is an integral and important part of the balanced rights of creditors and debtors in secured transactions.

The service of the summons, complaint, writ of replevin and bond (A. 35-39) constitutes notice to defendant of the pendency of the action. There is no *finality* in service of the writ; the defendant may answer and defend just as in any other action. Plaintiff, by posting bond in

⁵⁶Boddie v. Connecticut, 401 U.S. 371 28 L.Ed.2d 113, 119 (1971).

an amount double the value of the property,⁵⁷ secures the right to possession *pending* trial on the merits and subject to defendant's right to re-bond,⁵⁸ both protective provisions being absent from the Wisconsin garnishment statute struck down in *Sniadach*. The right to re-bond, and to thus maintain possession of the property during the action's pendency, gives defendant a right equal to that of the plaintiff and insures that the property or its value will be forthcoming if plaintiff prevails.⁵⁹

Appellant argues that the re-bonding remedy is "ineffective" (Appellant's Brief, p. 22), because bonds cost money and because a forthcoming bond requires posting security in addition to premiums. (See A. 4-6). The premium is the same for both parties' bond (\$10.00), it is just that the surety requires security for the forthcoming bond (A. 4-6). The insuror's collateral requirements are not within the control of Firestone or the State of Florida; they are the result of insuror's experience. The legislature acted reasonably when it gave both parties equal bonding rights; of it would certainly be acting unreasonably if it allowed defendant to regain possession of the property without the same bond plaintiff must post.

The statutory requirement for plaintiff to bond defendant's interest before replevy, together with the common-law actions for misuse of the writ, constitute ample

⁵⁷Flat.Stats. §78.07.

⁵⁸Fla.Stats. §78.13.

⁵⁹In this case the hi-fi and stove have been maintained in storage by Firestone to this day. (A. 83).

⁶⁰See, e.g. Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, at 501 (1970); Wheeler v. Adams Co., 322 F.Supp. 645, at 658 (D.Md. 1971); Ownbey v. Morgan, 256 U.S. 94, 112 (1921).

and appropriate deterrent to wrongful replevy. Appellant's argument that "economic balance" between the parties should be preserved through constitutional adjudication should not be persuasive.

The facts of this case do not include any claim by appellant that Firestone attempted to use the replevin remedy to enforce payment of a fraudulent debt, or that Firestone ever uses the writ for that purpose. There is no evidence in the record, and no study cited to the Court finding, that the remedy is used by creditors for such purposes. The replevin remedy is not characterized by appellant as "inhuman", which it was said described wage garnishment. Sniadach, supra, 395 U.S. at 340. The replevin statutes of 48 states and the District of Columbia61 require a replevin plaintiff to post bond to secure prejudgment replevy. The bond in Florida is in double the value of the property,62 conditioned to return the property to defendant if replevin is not finally adjudicated, and to pay for the loss of its use. (§78.07, Fla. Stats.) Unlike the wage-garnishment case, the replevin defendant is denied the use of certain items, which are not his "means to live", and he is guaranteed return of them or their value together with award for loss of their use in the event plaintiff does not obtain final judgment.

Conversely, the plaintiff in replevin must "insure" defendant against any damage which might result from wrongful replevy, in order to secure the writ. He thus binds himself to stand for any such damage. The fact

⁶¹Appendix A to brief of amicus, National Legal Aid and Defender Association.

⁶²This is required in 45 states. Ibid.

that plaintiff's replevin bonds are relatively inexpensive is eloquent testimony to the fact that plaintiffs do not use the procedure frivolously.63

In addition to liability on the bond, replevin plaintiff must be mindful of legal sanctions for abuse of process, wrongful attachment, and malicious prosecution.⁶⁴ These remedies are available to remedy misuse of the writ, and can result in awards of punitive as well as compensatory damages.⁶⁵

Constitutional adjudication need not and should not be undertaken simply because the procedure can be abused by unscrupulous persons. With potential exposure for wrongful or even mistaken use of the writ, business organizations would be foolish to use the procedure to "enforce a fraudulent debt." The same would be true of any solvent replevin plaintiff. The procedures and sanctions which now exist properly and fairly balance the parties' respective rights.

The remedy is a statutory adjunct of the parties' contract and the law of secured transactions. If, as a matter of policy, certain items of personalty are deemed to be important enough that a temporary loss of their use should not occur until final judgment, then it is the duty and function of the legislature to say so. The statute enacted in Connecticut is an example of the suitability of legislation

⁶³In her affidavit, a legal secretary stated that she could secure a plaintiff's replevin bond in this case for \$10.00, while defendant's requirements for a forthcoming bond would be cash security in the amount of the bond and premium of \$10.00-\$20.00. A. 4-6.

⁶⁴See 21 Fla. Jur. 283 (Malicious Prosecution); 80 A.L.R. 580 (Abuse of Process); 2 Fla. Law & Practice 113 (Wrongful Attachment).

⁶⁵Punitive damages are recoverable in tort actions involving malice, an element of the foregoing claims. 9 Fla. Jur. 452 (Damages).

for this purpose. If identified chattels cannot be used as security, they are not subject to repossession or replevy. But in such circumstances the credit seller has an opportunity to weigh this factor before extending credit. May, 1971, the outstanding consumer installment credit measured \$100,700,000,000.00;66 the portion of it extended on security agreements all being to some degree available in consideration of creditor's right to possession of the security upon default in payment.⁶⁷ It is unreasonable to contend that appellant's interest in temporary use of a hi-fi and a disconnected stove is so great as to require alteration of the delicate balance of this segment of our economy. The present statutory procedure does what is reasonably necessary to balance and protect the respective rights of parties to a voluntary, private contract. This Court's interpretations of constitutional due process do not compel the result appellant seeks; to the contrary, they require due process approval of the statutory replevin acts.

B. Temporary change of possession of secured personalty pursuant to the writ of replevin is not a "Taking of Property" of the debtor for due process purposes.

The Fourteenth Amendment forbids any State from depriving any person of property without due process of law. In *Sniadach*, the "property" involved was "enjoyment of earned wages" during the proceeding. 395 U.S. 339. In *Goldberg*, the "property" was public assistance payments, about which it was said:

⁶⁶Standard & Poor's Trade and Securities Statistics, July, 1971, p. 6.

⁶⁷See argument, supra, p. 14-25.

"It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'. Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." 397 U.S. 262, footnote 8.

Sniadach was deprived of wages which were undoubtedly her property, within common-law or any other concepts; the use of them was found to constitute "property" for due process purposes. The welfare recipient in Goldberg was found to have sufficient "property" in public assistance payments, by virtue of the "entitlement" theory. This action involves personalty which falls very clearly within traditional common-law concepts of property, and the property involved is not that of Mrs. Fuentes. It is submitted, therefore, that such temporary loss of use of personalty as is incident to replevy is not a taking of "property" within the meaning of the Fourteenth Amendment.

In Sniadach and Goldberg it was noted that loss of use of income could have dire economic consequences. Sniadach, presenting as it did an issue of cerditors' rights to pre-judgment debt enforcement, departed from a long-established rule stated succinctly in McInnes v. McKay, 127 Me. 110, 116, 141 A. 699, 702-03 (1928):

apparently rank as most nearly like property, for in other cases government benefit recipients have not been afforded the same procedural rights. Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970), rents raised in government low-rent housing project without a hearing; Torres v. New York State Dept. of Labor, 321 F.Supp. 432 (S.D.N.Y. 1970), unemployment compensation terminated without a hearing.

"But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of the debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution." ¹⁶⁹

The Court distinguished the Sniadach facts from "attachments generally"; the majority opinion did not imply that every temporary loss of use would henceforth be considered "property" for due process purposes. Certainly not every temporary loss of use of an object carries consequences similar to those experienced with loss of use of wages. Here, appellant was obliged to do without a hi-fi and a stove which was disconnected and sitting on the back porch. Though the "property" concept for due process purposes is undoubtedly expanding to include modern forms, it does not follow that the right to uninterrupted possession of every secured chattel must be considered "property" of the debtor, when everything in the parties' contract and in the laws of the states is to the contrary.

^{69&}quot;It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." Ewing v. Mytinger & Casselberry, 339 U.S. 594, 600 (1950) (citations omitted); Phillips v. Commissioner, supra. Due process requires hearing when a "significant" property interest is involved. Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 119 (1971).

⁷⁰Mr. Justice Harlan did, in his concurring opinion. 395 U.S. at 343.

The traditional conditional sale was a "retain title" transaction, in which legal title to a chattel remained in the seller/lender until the contract price was paid. Under the parties' agreement, buyer was entitled to possession only so long as contract payments were made: upon default in payment, seller became entitled to possession of his security. See cases, pp. 73-14 infra. The statutory replevin remedy was thereby made available to conditional seller upon buyer's default. The phraseology is different under the Uniform Commercial Code, but the substance of the parties' relationship is not changed. In a secured transaction, the secured party has the right to possession upon default (§9-503, U.C.C.).71 and "title" is not important. (§1-201(37), U.C.C.) 72 The argument in this case that "property" is being taken is even weaker than the argument made against pre-judgment attachment. In replevin, plaintiff assserts a possessory right to a specific item; in attachment, plaintiff asserts a non-specific claim against all of defendant's property to satisfy a claim not necessarily related to the items attached.

The value of the replevin plaintiff's possessory interest in the chattel is at least equal to defendant's, and often it is much greater.⁷³ The nature of the parties' relationship and the nature of the loss of use is so significantly different from the *Sniadach* situation that "it is (not) a deprivation of property contemplated by the Constitution." *McInnes v. McKay, supra.*, 141 A. 702-03.

^{71§679.9-503,} Fla. Stats.

⁷²§671.1-201, Fla. Stats. The Uniform Consumer Credit Code, §5-103, makes repossession of consumer goods purchased for \$1,000 or less, an election of remedies which procludes deficiency judgment.

⁷³See discussion, supra pp. 20-21, about default experience of automobile financers. A large percentage of all auto repossessions occur very soon after sale, at which time buyer has almost no equity in the security.

C. Modern statutory replevin combines ancient and common law remedies for retaking personalty, and complements private repossession rights in effect throughout the United States.

Through various forms of actions, the common law provided means to recover possession of personalty. The Florida statutory replevin procedure is typical of the consolidated, statutory remedy now available to gain possession of personalty.⁷⁴ A brief historical perspective of the remedy is useful.

The origins of replevin apparently pre-date the common law; the remedy is among the most ancient civil remedies. It developed due to abuses of an ancient practice which allowed a creditor or landlord to collect security for payment of rental or debt by physically appropriating property of the debtor. This activity was known as "distress"; it was utilized without judicial process. To replevy, the one distrained upon applied to the proper officer, and his distress was returned to him upon giving security to try the right of taking or distraining. The writ was sued out from Westminster, commanding the sheriff to return the

⁷⁴See Appendix A to Amicus Brief of National Legal Aid and Defender Association, surveying the remedy in the United States which is substantially correct.

⁷⁵R. Glanvill, Treatise On The Laws And Customs Of The Realm Of England, bk. 12, ch. 12 (G. Hall ed. 1965).

⁷⁶3 Blackstone Commentaries, 6; Gilbert on Distresses, 4.

⁷⁷This writ was called "replegiare facias", from which the word replevin derived. The first syllable (re) is equivalent to the English word "again" and the last two syllables (plegiere from Latin, or Plevir from Old French) means to "recover the pledge". Cent. Dict., 3 Black. Comm., 13.

distress to the owner and to see justice done between the parties. (3 Black. Comm., 146) In 1267, the procedure was codified, and was made issuable locally rather than from Westminster. (Statute of Marlbridge, 52 Henry III, Ch. 21).

The taking of the distress originated in the rough exercise of pure force, for which the will of the taker was the sole warrant. According to Wells, the written history of the law was not explicit on the subject, but enough remains to justify the belief that before the law had attained vigor enough to enforce its mandates, or compel that respect which is yielded to superior power, men employed their own individual force, and indemnified themselves for any real or supposed injury by seizing from their adversary enough of his property to compensate them for their loss.78 The possession of sufficient force being the only prerequisite to the seizure, such a taking was resisted by means of recapture and reprisals. The history of the law of replevin for the first five centuries is but a panoramic view of the struggles of men whose methods of resolving disputes had been barely civilized.79 The necessity of a judicial process in the action was summed up by Pollack and Maitland: 80

"Had we to write legal history out of our heads, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude

⁷⁸ Wells on Replevin, 4 (1880).

⁷⁹See, Cobbey on Replevin, 2 (1900).

⁸⁰Pollack and Maitland, History of English Law, Vol. II, at 572.

justice of revenge. There would be substantial truth in this theory. For a long time law was very weak, and as a matter of fact it could not prevent self-help of the most violent kind. Nevertheless, at a fairly early stage in its history, it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment. . . . This at all events was true of our English law in the thirteenth century."

Numerous common law remedies existed to recover possession of property, the form of action depending on the facts. Repleven remedied a wrongful taking, detinue a wrongful withholding, trover for conversion, etc. In time, the various forms were consolidated by statute, most often under the name "replevin" or "claim and delivery." The basic ingredient of common law replevin was retained in the statutory form, namely, that the remedy permitted possession of the personalty involved be resumed by the owner pending the outcome of the suit. \$2

Widespread use of the statutory remedy must be viewed as both a cause and effect of the phenomenal increase in credit buying. Consumer credit transactions could be effectively collateralized, and consumers were able to have immediate possession and use of chattels, on the con-

⁸¹See, Appendix A to Amicus brief of National Legal Aid and Defenders' Association.

⁸²Although this case, and undoubtedly a large percentage of all replevin actions, arises out of a consumer credit transaction, the remedy is still available to regain possesison of property wrongfully taken or converted, e.g. *Harman-Hull Co. v. Burton*, 106 Fla. 409, 143 So. 298 (1932); *Evans v. Kloeppel*, 72 Fla. 267, 73 So. 180 (1917). It would seem anomalous if due process were held to require notice and hearing before stolen or converted property could be re-taken.

dition that prescribed payments be regularly made, and on the condition that the right to possession would cease when payments ceased. If payment ceased, creditor had the right to possession of the chattel while the parties settled any dispute that might exist about debtor's default. [See, 1 Gilmore, Security Interests in Personal Property, 67 & 68, (1965)]. To a considerable extent, self help remained a creditor's remedy. Ibid.

The Uniform Commercial Code was developed in the context of America's consumer economy, and made provisions for the secured consumer transaction, among many others. The Code was first enacted in Pennsylvania in 1953;⁸³ and has since been made the law of all states, except Louisiana. The U.C.C. has also been enacted in the District of Columbia and the Virgin Islands. *Ibid.* In 51 jurisdictions, it is provided that:

"§9-503. Secured Party's Right to Take Possession After Default. — Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504."

It is thus the considered judgment of the Permanent Editorial Board of the Uniform Commercial Code and the legislatures of 50 jurisdictions and the Congress of the United States that secured creditors should have the right

⁸³ Martindale-Hubbel Law Directory, Uniform Acts, 3722 (1971).

⁸⁴Id, at 3776; Fla. Stats. §679.9-503.

to possession of their collateral when payments cease. They are entitled to possession forthwith, and if no breach of peace is thereby occasioned they can take possession without judicial process of any sort. The replevin remedy is available when breach of peace might otherwise occur.85 The value of and the purpose for the remedy, then, is perhaps the strongest and most important in civil law, to "prohibit in uncompromising terms any and every attempt to substitute force for judgment." Pollack and Maitland, History of English Law, supra. The right to possession is established by history and by contemporary standards; the remedy simply provides the means to enforce the right when it cannot be enforced privately and peaceably. It compels that respect which is yielded to superior authority, and which is necessary for peaceful settlement of civil actions. No more basic or important social purpose exists to justify a civil remedy.

The respective rights of creditors and debtors to possession of collateral is a subject particularly suited for legislation. The existence and form of the U. C. C. and the various state replevin enactments demonstrate that. The framers of the U. C. C. considered and rejected one aspect of the argument made here by appellant, namely that a conditional sales purchaser who has paid substantially all the contract price should not be subject to pre-judgment replevy.⁸⁶ The element of inexpensive and prompt repos-

⁸⁵The code also allows use of civil remedies in lieu of private action. §9-503, U.C.C.

⁸⁶The May, 1949, draft of the U.C.C. provided in §7-605 that notice of repossession be given if 60% or more of the contract price were paid. This notice requirement was eliminated in later drafts. In England, the Hire-Purchase Act of 1965, c. 66, p. III, provides that repossession may not be made without court order when more than one-third of the purchase price is paid.

session is important to the necessary salvage that must be undertaken when default occurs. The Code default provisions and the history of the conditional sale concept appreciate this and reflect recognition of the need for prompt, efficient, inexpensive creditor remedies following debtor default.³⁷ It is not properly the province of courts to engraft procedures into the remedy which may alter the economic and legislated balance.

The virtually unanimous historical and contemporary acceptance of the legality and propriety of "attachments generally" constitutes an unusually compelling argument in support of the constitutionality of the Florida replevin procedure. We do not deal here, as was the case in Sniadach, with "a most inhuman doctrine." 395 U.S. at 340. The procedure under attack here is not one which applies in a limited number of jurisdictions, as was the case in Sniadach. In various forms, pre-judgment levies have existed as creditors' remedies in the United States, and they have been approved "generally" by this Court.

Their long-continued existence and universal acceptance is a classic illustration of Mr. Justice Holmes' famous observation that:

⁸⁷This concern is far from "wailing at the wall." See, Kripke, Consumer Credit Regulation: A Creditor Oriented Viewpoint, 68 Colum. L. Rev. 445, 447-55, regarding the disappearance as independent commercial finance companies of three national level companies due to very low and declining profits. Also, Kripke, Gesture and Reality In Consumer Credit Reform, 44 N.Y. U. L. Rev. 1, 3-5.

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, . . . "88

POINT III

THE FOURTH AMENDMENT DOES NOT PROHIBIT A PEACEABLE SEIZURE OF COLLATERAL UNDER WRIT OF REPLEVIN, WHICH ENFORCES A CONTRACTUAL RIGHT OF REPOSSESSION.

Appellant's Point II presents her constitutional attack upon § 78.10, Fla.Stats., as violating the Fourth Amendment prohibition against "unreasonable searches and seizures." The lower court concluded — as we submit rightly so — that this section and the others under attack "to the extent that its provisions were before the Court by virtue of an actual controversy in this case, is constitutional." (A. 68); 317 F.Supp. at p. 959.

A. Appellant has no standing to question the constitutionality of section 78.10, Fla.Stats. and even if she did, the seizure here was not unreasonable.

⁸⁸ Jackman v. Rosenbaum, 260 U.S. 22, 31 (1922).

Despite the fact that § 78.10, Fla. Stats., permits a forcible entry into a house, building or other enclosure, if, after public demand. delivery of the property is not made, those provisions were not invoked here. The deputy sheriff executing the writ was admittedly invited into the Fuentes home;89 he did not forcibly enter. Although both appellant and her daughter-in-law. Mrs. Delgado, were made aware of the purpose of the deputy's visit and the effect of the replevin writ he was serving, it was not appellant who voiced any objection to the deputy's repossession of the subject personalty, but Mrs. Delgado, who had no interest in the property or standing to object to its repossession. (A. 27, 28). It was Mrs. Delgado who wanted the assistance of appellant's son-in-law, Mr. Leon, for advice in the matter. (A. 28). And, Mr. Leon's only objection was that, according to his attorney, a court proceeding was necessary for repossession. (A. 28). Upon the deputy's explanation of the fact that there was a court action in which the replevin writ was issued, no further objection was raised by anyone and the deputy was permitted to repossess the stove and hi-fi. (A. 28) The stove was actually disconnected and located on an outside open porch, exposed to the elements, while the hi-fi was pointed out in the living room. (A. 28).

The deputy sheriff serving the writ of replevin had no occasion to exercise the authority granted by Section 78.10 to break open or into the Fuentes home. The entry

⁸⁹Evidence was in dispute as to the time, but not the fact, of invited entry, the deputy contending he was invited into appellant's home immediately after announcing his presence at the door, while appellant asserted the invitation was not extended until after her son-in-law's arrival. (A. 27).

was entirely peaceable and without force of The forcible entry provisions of § 78.10 not having been invoked, their validity is not subject to attack here.

One can be heard to question the validity of a statute "only when and so far as it is being or is about to be applied to his disadvantage." Utah Power & Light Co. v. Pfost, 286 U.S. 165, 186 (1932) and cases cited therein. One has no standing to attack the constitutionality of a statute unless he "has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement." Massachusetts v. Mellon, 262 U.S. 447, 448 (1923); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). A hypothetical threat is not enough. United Public Workers v. Mitchell, 330 U.S. 75 (1947). A genuine and present controversy, not merely a possible or conjectural one, must exist with reference to the statute's validity. New Orleans v. Benjamin, 53 U.S. 411 (1894); Defiance Water Co. v. Defiance, 191 U.S. 184 (1923).

No breaking of or into the home of appellant having occurred here, there is no genuine Fourth Amendment controversy. In short, under the undisputed facts, appellant was and is without standing to question the constitutionality of the provisions of § 78.10.

⁹⁰As the lower court found: "This case involves a peaceable entry."
(A. 67); 317 F.Supp. at p. 958. In fact appellant does not complain that this statutory power is routinely abused, an implication she makes in argument that the writ should not issue at all without a trial. Nothing in this record by way of evidence or empirical study indicates that the procedure is used in the fashion which is the basis of appellants arguments.

It is axiomatic that only such "searches and seizures" which are "unreasonable" are proscribed by the Fourth Amendment, e.g. Wyman v. James, 400 U.S. 309 (1971); Terry v. Ohio, 392 U.S. 1 (1968). As stated by the Epps⁹¹ court: "The conduct herein complained of does not descend to the level of unreasonableness..." No threats or intimidations by the deputy sheriff were made to appellant. No forcible entry was exerted. No force was used. Simply, a civil writ of replevin was served in a peaceable manner, and after explaining its contents and effect, the officer removed the chattels without force or objection. By the test of balancing the need to search [or seize] against the invasion which the search [or seizure] entails⁹², the "invasion" was so negligible that it in no event could be declared "unreasonable".

The thrust of appellant's search and seizure attack appears to be predicated upon her counsel's unsubstantiated fear of the worst conceivable situation that could occur if the forcible entry (breaking) provisions of § 78.10 Fla.Stats., were utilized; e.g., an overzealous deputy, after receiving no response to his light knock on the door at 2:00 A.M., breaks into the house, forcibly pushes the mother and children out of the beds onto the floor and rapidly flees into the night, taking with him the family's only crib and mattress. But, appellant has not demonstrated that the breaking provisions of the statutes are or have been used with any frequency, or at all; or that such use as has occurred could amount to an unconstitutional search and seizure.

⁹Epps v. Cortese, 326 F.Supp. 127, 137 (1971).

⁹²Camara v. Municipal Court, 387 U.S. 523, (1967).

There was not breaking or forcible entry here and the repossession, under the undisputed facts, was entirely reasonble.

B. The Fourth Amendment has no application to a civil seizure of property pursuant to a court writ.

For as long as this Court has been construing and interpreting the Fourth Amendment restrictions on unreasonable searches without warrant, it has defined those rights in context and terms of enforcement of criminal liability, not civil liability, e.g. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. 272 (1856); Boyd v. United States, 116 U.S. 616 (1886); Frank v. Maryland, 359 U.S. 60 (1959); Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); Wyman v. James, 400 U.S. 309 (1971).

The Fourth Amendment itself was the result partially of prior judicial recognition that the right against self-incrimination must be reinforced by the right to be free from unreasonable searches. In an opinion recognized as the judicial forerunner to the Fourth Amendment, Lord Camden put the rights in juxaposition in Entick v. Carrington, 19 Howell's State Trials 1029, 1073 (1765):

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel

⁹³Other Courts have done likewise: 935 Cases more or less, etc., 136 F.2d 523 (6th Cir. 1953), U. S. v. Eighteen Cases of Tuna Fish, 5 F.2d 979 (D.C. W. Va. 1925).

⁹⁴The Fourth Amendment significance of *Entick* was expressly recognized by this Court in its *Boyd* decision.

and unjust; and it should seem, that search for evidence is disallowed upon the same principle. Theretoo the innocent would be confounded with the guilty."

In the course of its decision in Murray's Lessee v. Hoboken Land and Improvement Co., 95 this Court expressly held that the Fourth Amendment 66 has no reference to civil proceedings for the recovery of debts." Some years later, 96 that opinion was expressed more definitively, that "the entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a political writ, such as an attachment, a sequestration or an execution, is not within the prohibition of the Fourth Amendment."

Both Murray's Lessee and Boyd dealt with the question of substance and form. Whether Fourth Amendment provisions applied in the case of a distress warrant issued without oath or affirmation for taxes due was at issue in Murray's Lessee (59 U.S. at 285-286):

"The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the 4th article of the Amendments of the Constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the Act of Congress, a warrant of distress. The name bestowed upon it cannot

⁹⁵⁵⁹ U.S. 272, (1856).

⁹⁶Boyd v. United States, 116 U.S. 616, 624 (1886).

affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause.

And in Boyd (116 U.S. at 634):,

"The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . we think that they are within the reason of criminal proceedings for all the purpose of the fourth Amendment. . . ."

In Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), the search and seizure provisions of the constitution were applied to governmental intrusions which were quasi-criminal in nature, yet were still "true search[es] for violations." ⁹⁷

Camara involved the right of San Francisco Housing Code Inspectors to make area inspections of housing facilities to ascertain the existence of Housing Code violations. (387 U.S. at 526). Camara refused to allow the search, and was charged under the "catch-all" violation provision of the Code which punished alike violations of the Code and refusal to comply with inspectors' efforts to administer it. (Ibid). This governmental inspection was held to be a "search" subject to the warrant/probable cause restrictions of the constitution. The inspection was not made in pursuance of any civil remedy; it was part of a routine,

⁹⁷ Wyman v. James, 400 U.S. 309, 325 (1971).

governmental inspection of all residences in the area for the purpose of ascertaining the existence of Housing Code violations. Violations of the Code were misdemeanors. No contention was made that the Code could not be successfully administered within the confines of a search warrant requirement. (387 U.S. at 533). This Court did not rule that all inspections must be performed pursuant to warrant issued upon some sort of judicial finding of probable cause. Rather, it held:

"Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." 387 U.S. at 539-540.

The Court did not require a warrant be issued for every inspection, only those when entry was refused. Nor did it require that warrant be issued in every case where entry is refused. Provision was made, for entry without a warrant upon a citizen's complaint or when other satisfactory reason appears for immediate action. See simply extended the Camara holding to governmental searches of business as well as residential premises. 387 U.S. at 546.

Wyman v. James, 400 U.S. 309 (1971), made clear that, when it decided Camara and See, the Court had not abandoned the criminal-civil distinction for search and seizure purposes. There it was claimed that certain home visitation (required by New York state and city social

services in connection with administration of the Aid to Families with Dependent Children program) constituted a search for constitutional purposes. The purpose of the visit included ascertaining whether aid should continue; a recipient could have benefits terminated for refusal to allow the visits. (27 L.Ed.2d 410)

"It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic 'contacts' (which may include home visits) for the inception and continuance of aid. It is also true that the case worker's posture in the home visit is perhaps in a sense, both rehabilitative and investigative. But this latter aspect, we think is given too broad a character and far more emphasis than it deserves if it is equated with the search in the traditional criminal law context. (27 L.Ed.2d at 414)

The Court also noted that, even if the visit was a search, it was not proscribed by the Fourth Amendment since it was not unreasonable, quoting Chief Justice Warren:

"the specific content and incidents of this right must be shaped by the context in which it is asserted." ""

The distinguishing factors of Camara and See were that "[e]ach concerned a true search for violations . . . each case arose in a criminal context . . ." (Wyman, 27 L.Ed.2d 418). Here, however, governmental intervention in other-

⁹⁸²⁷ L.Ed.2d 414, citing Terry v. Ohio, 392 U.S. 1, 9 (1968).

wise private action is involved. "The step is not an automatic one.""

Never has this Court indicated that Fourth Amendment restrictions applied to enforcement of purely civil processes. Camara and See certainly did not present any such case; both involved governmental functions which were carried out in a quasi-criminal context. Appellant attempts to provide the criminal element here by saying that a citizen can be subject to criminal prosecution for hindering a law officer in the performance of his duty.100 But this is not an incident of the replevin procedure; she would be equally susceptible to that charge whether a search warrant were issued or not. The essential purpose in Camara and See was the search for violations of law. That is not the object of replevin. No greater potential for criminal charges exists in the replevin context than in the enforcement of executions after judgment, or the disobeyance of a policeman in the exercise of any official duty. People are obliged not to hinder policemen in the course of their duties; and the fact that society enforces that dictate with criminal liability does not turn every civil process into a Fourth Amendment search. Camara and See were both different; there the specific authority to inspect carried criminal responsibility for refusing access.

^{**}Comment, Laprease and Fuentes: Replevin Reconsidered, 71 Colum. L.Rev. 886, 900 (1971).

¹⁰⁰The suggestion by plaintiff (p. 45 and footnote 18 on p. 45) that property taken under a replevin writ could be used as evidence in support of a charge of disposing of property subject to alien under § 818.01, Fla. Stats, is ill-founded, inasmuch as that section was repealed by implication by the passage of Ch. 65-254, Laws of Florida, 1065 (Section 679. 311, Fla. Stats.) Opinion of Attorney General 071-6, January 25, 1971 (SA 1-4).

The Fourth Amendment never has applied to intrusions by private individuals, even wrongful ones, but only to strictly governmental actions. Bordeaux v. McDowell, 256 U.S. 465 (1921). The aid of the sovereign provided for enforcement of private contractual rights lawfully exacted, should not render it applicable to bar a peaceful repossession through execution of a court-issued replevin writ.

There is a vast distinction, moreover, between intrusions on privacy by the government to search for evidence for violations of law and entries to recover possession of property to which one is entitled and which is wrongfully withheld or detained. As this Court said in Davis v. United States, 328 U.S. 582, 593 (1946):

And, where one is seeking to reclaim his property which is unlawfully in the possession of another, the normal restraints against intrusion on one's privacy, as we have seen, are relaxed.

See also, Boyd v. United States, supra¹⁰¹ and Harris v. United States, 331 U.S. 145 (1947)

Indeed, this is the predicate of replevin procedures. § 78.01, Fla.Stats., prescribes issuance of the replevin writ only for goods or chattels "wrongfully detained by any other person or officer".

Consideration too must be given to the fact that the replevin statutes of the majority of states have long ex-

¹⁰¹Noting the distinction between the seizure of forfeited goods or those liable to duties and the search for and seizure of a man's own private papers for the purpose of securing evidence against him, the Court said (116 U.S. at p. 623):

[&]quot;In the one case, the Government is entitled to the possession of the property; in the other it is not."

pressly authorized forcible entries (Appendix A to brief of American National Legal Aid and Defenders Association) or have been construed to imply such authority. (Laprease and Fuentes: Replevin Reconsidered, Vol. 71, Colum L. Rev., 886, 900) Long usage, acquiesced in by the courts, "goes a long way to prove that there is some plausible ground or reason for it in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage." Boyd v. United States, supra, 116 U.S. at 622. Continued and long usage of such statutorily authorized procedures and the Courts' recognition of them should not be lightly cast aside.

As with her due process contentions, appellants search and seizure arguments, if valid at all, are too broadly stated. There is no more reason to require issuance of a warrant for every replevy than there was reason to require housing inspectors to have them for every inspection. (Camara v. Municipal Court, 387 U.S. at 539-540). Indeed, such a procedure would render replevin useless in those cases when summary replevy is necessary and proper. If this Court departs all history and precedent, and requires search warrant procedures in service of civil processes, it should certainly require no more than it did of the San Francisco Housing Authorities.

When all was said and done in Camara, housing inspectors were not required to have a warrant to inspect every house or building; nor should civil plaintiffs in replevin actions be required to have any more for the routine service of writs of replevin. 102 If there is any warrant re-

¹⁰²Here, even more than Camara, "Because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involved a relatively limited invasion of the . . . citizens privacy" 387 U.S. at 537.

quirement at all, it "should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." 387 U.S. at 539-540. Some allowance must be made for the fact that there are people who run off with things, or destroy them to avoid repossession; there must be some appreciation of the myriad of private civil relationships in which the remedy operates.

It remains more to the point to say that the Fourth Amendment was not designed to intervene in private contract disputes, and the enforcement of them. There are circumstances in which solution of civil remedies requires the arm of the government in order to preserve peace while civil laws are effected. To engraft on those procedures a body of law born and reared in the context of criminal liability serves no useful social or legal purpose. There is nothing in the words of the Constitution or the prior decisions on this Court which requires the processes of civil litigation to be so burdened.

C. The parties' contract authorized a peaceable repossession of the subject personalty by Firestone.

Under the contract between appellant and Firestone, the latter retained "title and right of possession of said merchandise" until fully paid for and appellant expressly agreed with Firestone that, "in the event of default in any payment or payments", Firestone might repossess the merchandise. (A. 32, 34). Under Section 679.9-503, Fla. Stats., 103 Firestone, as a secured party, had a right, upon appellant's default, to retake the merchandise without re-

¹⁰³This Uniform Commercial Code provision is in effect in all of the states, save Louisiana.

sort to any judicial proceedings whatever, if it could be done without breach of the peace.104 Or, as it did here, it had the right to utilize statutory replevin procedures. Ibid. If it is reasonable for one to use self-help-without judicial process or bonding requirements—to peacefully repossess personalty in which he has a contractual security interest, even to the extent of going on to another's property to do so, are not court processes for the recovery of possession (which give defendant the benefit of security protection, a right to return of the property upon posting a forthcoming bond, and a right to an ultimate trial upon the merits of the claim to possession) even more reasonable? And, the aid of a court officer executing judicial process for repossession pursuant to a contractual right will, most certainly, diminish instances of breaches of peace when the parties are unable to use private remedies.

The court below put the issue in its proper context: "Whether, absent authorization to break down the door or otherwise enter forcibly, the Fourth Amendment prohibits parties to a conditional sales contract from contracting for peaceable repossession." The lower court concluded, and we submit correctly (317 F.Supp. at pp. 958, 959):

"We think the answer is obviously an emphatic no. The Fourth Amendment does not prevent private parties from contracting, as the plaintiff here did, that one may peaceably enter the other's house.¹⁰⁵

¹⁰⁴This statute has recently withstood constitutional attack. McCormick v. First National Bank, 322, F.Supp. 604 (1971).

¹⁰⁵Bumper v. North Carolina, 391 U.S. 543 (1968), cited by appellant, can have no relevance here, as the lower court did not hold that plaintiff's consent to seizure at the time the writ was served

Appellant attacks the lower court's reasoning in this regard as "misdirected because appellant does not challenge a private invasion of protected privacy but rather a state authorized and implemented intrusion pursuant to the lawful execution of a replevin writ." (p. 38, Brief of Appellant). The fact that Firestone invoked authorized judicial processes to enforce this private contractual right should not detract from its validity nor render its enforcement violative of the Fourth Amendment. There certainly is nothing injurious to public interest or contrary to public policy about a contract permitting peaceable repossession of chattels by a conditional seller upon the buyer's default in payment. The facts here undeniably show a peaceable repossession of the subject personalty. Nor. does the fact that the statute prescribed aid of the sovereign in enforcing this private contractual right render applicable here Fourth Amendment prohibitions. As one legal author recently put it:

"Simply because a state replevin statute provides for the intervention of a sheriff in such cases, and thus minimizes the danger of violent confrontation, is it necessarily logical to require as a corollary thereto that the seller's otherwise existing rights be restricted by the requirement of obtaining a search warrant?" (Vol. 71, Colum. L. Rev. 866, 901)

Nothing in our history or in our constitutional law would require such a result.

amounted to a waiver of her Fourth Amendment rights. There is certainly a basis for such a finding, nonetheless, since appellant herself made no objection to the repossession of the subject property. Davis v. United States, supra.

Appellant also urges that the language of the contract between appellant and Firestone does not specifically authorize entry upon appellant's premises. The presence or absence of such a provision is of no consequence. The very retention, by contract, of title to property carries with it the right to return of the property upon default by the buyer, e.g., Goldberg v. List, 11 Cal.2d, 389, 79 P.2d 1086 (1938); Blackford v. Neaves, 23 Ariz. 501, 205 P. 587 (1922): Stowers Furniture Co. v. Brake, 158 Ala. 639, 48 So. 89 (1908); Pels & Co. v. Cambridge Architectural Iron Works. 192 Mass. 13. 77 N.E. 1152; Smith v. Barber, 153 Ind. 323 (Miss. 1899); Williams v. Williams, 23 So. 291 (1898); 55 A.L.R. 184, 146 A.L.R. 1331. And the courts have uniformly held parties to have the power to contract for the retaking by the seller of the property upon the buyer's default without resort to judicial processes, if he can do so peaceably. Percifield v. State, 93 Fla. 247, 111 So. 519 (1927); Universal Credit Co. v. McKinnin, 166 Fla. 849, 143 So. 778 (1932); 9 A.L.R. 1180; 105 AL.R. 926; 99 A.L.R.2d 360. In fact, the contracted right to repossession upon default itself carries with it the right to "peaceably enter upon the premises of the [buyer]."107 Willis v. Whittle, 82 S.C. 500, 64 S.E. 410 (1909); Soulios

¹⁰⁶Some courts have even sanctioned the use of necessary force, including forcible entry, for repossession pursuant to contract. 9 A.L.R. 1180. Contractual stipulations expressly conferring the right of entry upon the buyer's premises to repossess in the event of buyer's default have been construed to confer upon the seller an irrevocable license to forcibly, if necessary, enter the buyer's dwelling house. Lambert v. Robinson, 162 Mass. 34, 37 N.E. 753 (1894); Walsh v. Taylor, 39 Mass. 592 (1874); W. T. Walker Furniture Co. v. Dyson, 32 App.D.C. 90, 19 L.R.A. (N.S.) 606.

¹⁰⁷Parties may certainly expressly contract for the seller to enter upon the buyer's premises to recapture possession. C.I.T. Corporation v. Reeves, 112 Fla. 424, 150 So. 638 (1933); Prosser on Torts, (2d Ed.) p. 103.

v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941); Prosser on Torts (2d Ed.) p. 103 (footnote 45); See Besner v. Smith, (Munic.Ct.App., D.C. 1962) 178 A.2d 924.¹⁰⁸

Appellant cannot complain here, much less make a constitutional case, of that to which she agreed as a condition of her time purchase—an entirely peaceable repossession of the merchandise upon her default in payment.

¹⁰⁸ Analogous here is the holding of the court in Besner, even in a self-help repossession, that (at p. 926):

[&]quot;After numerous written requests to pay the arrears, the husband finally told the seller that if he didn't pay the amount then due after a short period he could come by the house and pick up the set. This the seller did.*** The wife does not disclaim that she admitted the seller's agent; she makes no charge that there was an assault upon her in the house or that force was used in entering or in taking and removing the set; and she raised no objection to its removal."

CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, the Final Judgment for the appellees, upholding the constitutionality of Florida's statutory replevin procedures, should be affirmed.

Respectfully submitted,

REORGE W. WRIGHT, JR.

KARL B. BLOCK, JR.

1600 First National Bank Building Miami, Florida Attorneys for Appellee, The Firestone Tire & Rubber Company

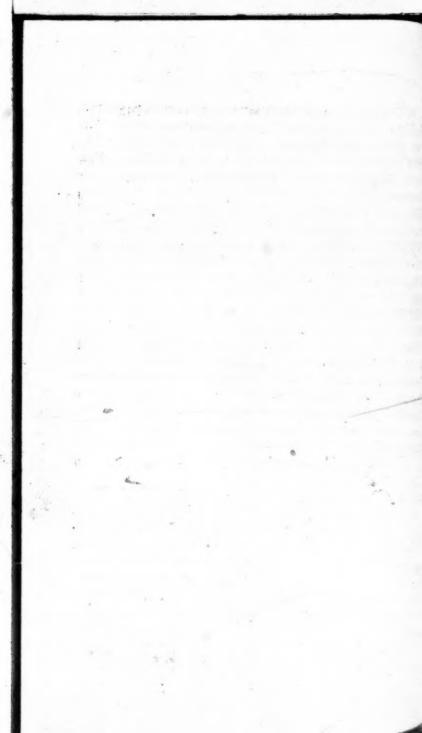
MERSHON, SAWYER,
JOHNSTON, DUNWODY &
COLE
1600 First National Bank Building
Miami, Florida
Of Counsel for Appellee, The Firestone Tire & Rubber Company

PROOF OF SERVICE

I HEREBY CERTIFY that on this 28th day of Sentember, 1971, service of three copies of the printed brief and appendix of Appellee, The Firestone Tire and Rubber Company, was duly made upon the following by depositing same in a United States mail depository, with first class (or air mail as to those residing more than five hundred miles from Miami, Dade County, Florida) postage prepaid: BRUCE S. ROGOW, ESQ., DONALD C. PETERS. ESQ., RENE V. MURAI, ESQ., Legal Services of Greater Miami, Inc., 622 N. W. 62nd Street, Miami, Florida 33150; and C. MICHAEL ABBOTT, ESQ., 2837 Pittsfield Boulevard, Ann Arbor, Michigan, Attorneys for Appellant: DANIEL S. DEARING, ESQ., Office of the Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee, Robert L. Shevin, Attorney General of the State of Florida; ALLAN ASHMAN, ESQ., R. PATRICK MAX-WELL, ESQ., 1155 East 60th Street, Chicago, Illinois 60637, Attorneys for Amicus Curiae, National Legal Aid and Defender Association: THOMAS L. EOVALDI, ESQ., Professor of Law, Northwestern University, School of Law, Chicago, Illinois, Of Counsel for Amicus Curiae, National Legal Aid and Defender Association; JEAN CAMPER CAHN, ESQ., BARBARA B. GREGG, ESQ., 1145 19th Street, N.W., Suite 509, Washington, D.C. 20036, Attorneys for Amicus Curiae, Urban Law Institute of the National Law Center of George Washington University; BLAIR C. SHICK, ESQ., MARK BUDNITZ, ESQ., DONALD FOSTER, ESQ., RICHARD A. HESSE, ESQ., 38 Commonwealth Avenue, Brighton, Massachusetts 02135, Attorneys for Amicus Curiae, National Consumer Law Center of Boston College Law School; HARRY N. BOUREAU, ESQ., PHILLIP G. NEWCOMM, ESQ., ERIC

B. MEYERS, ESQ., First National Bank Building, Miami, Florida 33131, Attorneys for Amicus Curiae, General Motors Acceptance Corporation; ROBERT L. CLARE, JR., ESQ., GEORGE J. WADE, ESQ., 53 Wall Street, New York, New York 10005, Attorneys for Amicus Curiae, The National Cash Register Company; ROSS L. MALONE, ESQ. and SHUTTS & BOWEN, ESQS., First National Bank Building, Miami, Florida 33131; SHEARMAN & STERLING, ESQS., 53 Wall Street, New York, New York 10005; DIXON, BRADFORD, WILLIAMS, Mc-KAY & KIMBRELL, P.A., 9th Floor, Dade Federal Building, Miami, Florida 33131; JEPEWAY, GASSEN & JEPEWAY, ESQS., 101 E. Flagler Street, Miami, Florida 33131: LYNN & LYNN, ESQS., 11 North Pearl Street, Albany, New York 12207; MOORE, WELBAUM, ZOOK & JONES, ESQS., Biscayne Building, Miami, Florida: Of Counsel for Amici Curiae, General Motors Acceptance Corporation, Chrysler Credit Corporation, Ford Motor Credit Company, Universal CIT Corporation, American Industrial Bankers Association, White Motor Company, National Cash Register Company.

GEORGE W WRIGHT, JR.
1600 First National Bank Building
Miami, Florida 33131
Attorney for Appellee,
The Firestone Tire and Rubber
Company



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	Net profit after taxes as a percent of sales and
6	rates of return after taxes for District of Co- lumbia Retailers surveyed, 1966
6	Reliance on Credit According to Income (The Poor Pay More)
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9.10	onsumer Credit: 1950 - 1970 (Total and by Type)
w	umulative Percentage of Repossessions on New
	and Used Cars Financed by Number of Instal-
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SUPPLEMENTAL APPENDIX OF APPELLEE, FIRESTONE

STATE OF FLORIDA DEPARTMENT OF LEGAL AFFAIRS

The Capitol
Tallahassee, Florida 32304

January 25, 1971

071-6

Honorable Rom W. Powell County Solicitor Criminal Court of Record Orange County Courthouse Annex-Room 401 Orlando, Florida 32801

Dear Mr. Powell:

Your letter dated December 30, 1970 has been received. You request the opinion of this office as to whether Section 679.311, Florida Statutes, 1969, supersedes the provisions of Section 818.01 thereof.

Section 679.311 which became law with the passage of Chapter 65-254, Laws of Florida 1965, effective at 12:01 a.m., January 1, 1967, provides as follows:

"679.311 Alienability of debtor's rights: judicial process.—The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default."

Section 818.01 provides in pertinent part as follows:

"(1) Whoever shall pledge, mortgage, sell, or otherwise dispose of any personal property to him belonging, ... which shall be subject to any written lien, ... without the written consent of the person holding such lien, ... shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one year."

It is apparent that Section 679.311 permitting a debtor to sell his interest in collateral which may be subject to a written lien is in conflict with Section 818.01 which provides that a person who so disposes of collateral without the written consent of the lienor is guilty of a misdemeanor. Although Section 818.01 has not been expressly repealed in its entirety, it is my opinion that it may yield to the conflicting provisions of Section 679.311.

It is well settled that where two legislative acts are in conflict with each other, the one last passed, being the latest expression of the legislative will, must govern even though it contains no repealing clause. Routh v. Richards, 138 So. 69 (Fla. 1931). As above indicated, Section 679.311 became law with the passage of Chapter 65-254 in 1965. Section 818.01 has been on the books in substantially its present form since 1923. See Chapter 9288, Laws of Florida 1923.

Section 680.103, Florida Statutes, 1969, is a general repealer statute and provides that: "Except as provided in Section 680.14, all laws and parts of laws inconsistent with this code are repealed." This statute is indicative of the legislative will and is sufficient to accomplish the

stated purpose. I say this although I am fully aware that in some jurisdictions, such a repealing statute adds nothing to the repealing effect of the act of which it is a part, since even without such provision, all prior conflicting laws, or parts of laws, would be repealed by implication. See generally 82 C.J.S. Statutes §285, p. 476.

The controlling principle is well stated at 50 Am.Jur. Statutes §250, p. 529:

within itself covering the whole subject, contains a provision to the effect that all laws and parts of laws inconsistent or in conflict therewith are repealed, the repeal extends to conflicting statutes and provisions only; all laws and parts of laws not in conflict therewith are left in full force and effect. A statute which is not wholly inconsistent with the new act continues in force except in so far as it conflicts therewith."

82 C.J.S. Statutes §291, p. 492, reads in pertinent part as follows:

"Where there is sufficient repugnancy or inconsistency between two statutes, or parts of two statutes, to effect a repeal by implication, the earlier statute is impliedly repealed to, and only to, the extent of the conflict, repugnancy, or inconsistency."

Based on the foregoing, it is my opinion that the conflicting provisions of Section 818.01 were repealed by

the passage of Chapter 65-254, Laws of Florida 1965, more particularly, Section 679.311 thereof as same appears in the Florida Statutes, 1969.

Sincerely,

/s/ Robert L. Shevin Robert L. Shevin Attorney General

RLS/Am
Prepared by:
/s/ Wallace E. Allbritton

Wallace E. Allbritton Assistant Attorney General

TABLE II-5.—Comparison of expenses and profits as percent of sales for 10 low-income market retailers and 10 general market retailers of furniture and appliances in the District of Columbia, 1966

	10 low-income	10 general	Difference in m	Difference in margine and ratios				
Revenue component	market market retailers retailers		Percentage points	Percen of tota				
1966 net sales	\$5,146,395	\$5,405,221	*****************	************				
Operating ratios as	Percent	Percent						
percent of sales	100.0	100.0	******************	***********				
Cost of goods sold	37.8	64.5	**********************					
Gross profit margin	62.2	35.5	+26.7	100.0				
Salary and commis- sion expense 1	28.2	17.8	+10.4	38.9				
Advertising expense	2.1	3.9	-1.8	-6.7				
Bad-debt losses 2	6.7	.3	+6.4	24.0				
Other expenses ³	21.3	11.2	+10.1	37.8				
Total expenses	58.3	33.2	+25.1	94.0				
Net profit return on sales	3.9	2.3	+1.6	6.0				

¹ Includes officer's salaries.

Source: FTC Survey .

² Includes amounts held back by finance companies to cover bad-debt losses.

Other expenses, including taxes, after deduction of other income.

TABLE II-6.—Net profit after taxes as a percent of sales and rates of return after taxes for District of Columbia retailers surveyed, 1966

Type of retailers	Net profit after taxes as a percent of sales	Percent rate of return after taxes on stock- bolders' equity
Low-income market retailers	4.7	10.1
General market retailers:		
Appliance, radio, and television stores	2.1	20.3
Furniture and home-furnishing stores	3.9	17.6
Department stores	4.6	13.0

Source: FTC Survey

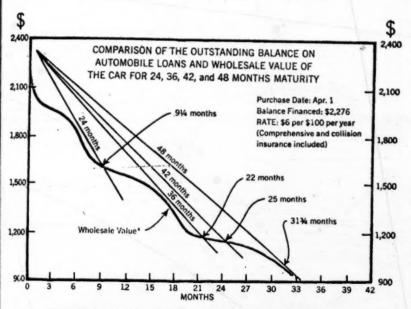
TABLE 7.4—Reliance on Credit According to Income
(In Per Cent)

Reliance on Credit	Under \$2,500	\$2,500- \$3,499	\$3,500- \$4,499	\$4,500 and Ove	
Did not use credit	36	* 14	12	18	
Used credit—no debts	21	21	20	17	
Debts outstanding	43	65	68	65	
Total per cent	100	100	100	100	
Total cases	(101)	(151)	(124)	(88)	

Source: Caplovitz, The Poor Pay More.

The Longer the Maturity on Auto Loans, the Longer the Wholesale Value of the Car Is Below the Outstanding Balance

This chart indicates the increased risk assumed by lenders on loans as the maturity of automobile loans is extended from 36 to 42 to 48 months. On a 24-month loan, the outstanding balance of a loan is greater than the wholesale value of the car for the first 9½ months of the loan. It is during this period that the lender assumes the greatest risk since he is not likely to recover the outstanding balance if the car is repossessed and sold. With a 36-month loan, this period of risk exposure is extended to 22 months. On a 42-month loan the risk exposure period lasts for 25 months, whereas on a 48-month loan, the outstanding balance on the loan does not fall below the wholesale value for almost 32 months.

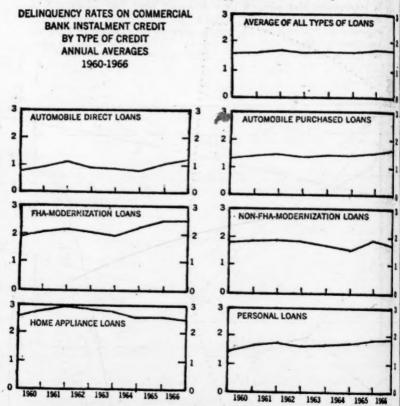


*Wholesale value line based on three-month moving averages.

SOURCE: The American Bankers Association, Timely Notes on Instalment Credit, July 1963, reprinted in Trends in Instalment Credit, prepared in 1967 for the Instalment Credit Committee by the Dept. of Economics & Research, The American Bankers Association.

Auto Loans Have the Lowest Delinquency Rates

The average delinquency rate in 1966 for all types of instalment credit was 1.76 per cent. Direct automobile loans had the lowest delinquency rate with 1.08 per cent, while purchased automobile loans had the next lowest with 1.60 per cent. Bank modernization loans came next with 1.72 per cent followed by personal loans with 1.85 per cent. The highest delinquency rates were recorded for FHA modernization loans—2.41 per cent—and for home appliance loans—2.45 per cent.



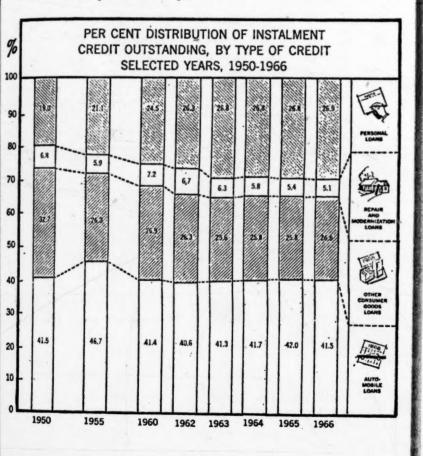
NOTE: Delinquency rates — annual average per cent of number of loans delinquent to total number of loans outstanding of each type of credit. The average of all types is weighted by the proportionate amount of each type of credit outstanding.

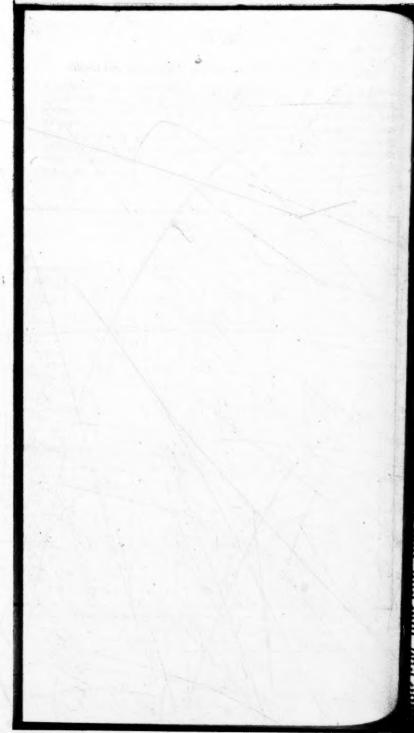
SOURCE: The American Bankers Association, Delinquency Rates on Bank Instalment Loans, reprinted in Trends in Instalment Credit,

supra.

Auto Loans Represent 42 Per Cent of Total Instalment Credit

Automobile loans represented 41.5 per cent of total instalment credit at the end of 1966, remaining relatively stable during the sixties. The personal loans portion of the market also remained stable during the sixties, although compared to 1950 it went up from 19.0 per cent to 26.9 per cent of the total. Other consumer goods loans and repair and modernization loans have been experiencing decreases in their relative share of the instalment credit market; specifically the former dropped from 32.7 per cent in 1950 to 26.5 per cent in 1966, while the latter went from 6.8 per cent to 5.1 per cent.



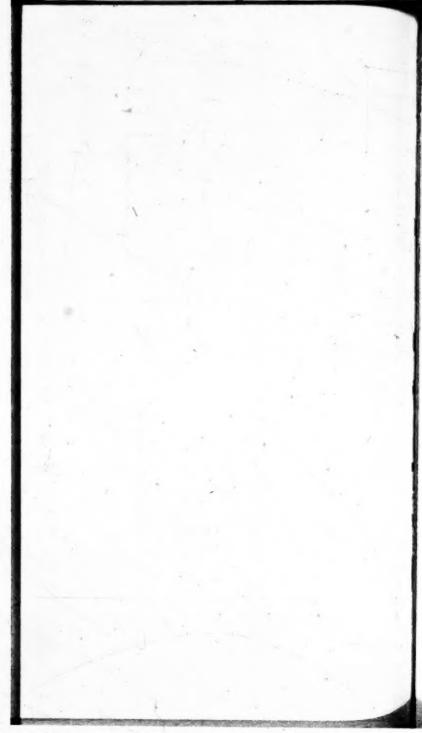


SA 10

BUSINESS STATISTICS, 1969 EDITION

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	77, 744 77, 672 77, 763 61, 284 62, 551 60, 755	42, 439 42, 439 63, 672 64, 137 65, 695 64, 148	34, 957 25, 107 25, 407 25, 924 36, 405 36, 932	16, 309 15, 947 16, 847 16, 029 16, 306 16, 468	1 550 1 517 1 512 1 550 1 547 1 600	17, 973 18, 643 18, 234 18, 444 18, 917 19, 200	51, 988 54, 257 54, 780 53, 814 54, 712 57, 723	25, 191 25, 319 25, 610 34, 200 34, 670 27, 214	11,586 11,429 11,446 13,601 10,941 14,147	4.373 4.334 4.438 4.403 4.777 4.890	4,519 4,575 4,641 4,754 4,638 4,921	deletetetetetetetetetetetetetetetetetete
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No. 497. PERCENT DISTRIBUTION OF HOUSEHOLDS OWNING CARS AND APPLIANCES, By Income Level: 1960 and 1969

[Based on January 1960 and average of January and July 1969 sample surveys, except as noted. Ownership is not a direct measure of availability; many renter households live in units where major appliances are provided by the property owner]

,	C	RS	TELE	PLSION .			Refrig-		Atr
INCOME LEVEL	One or more	Two or more	Black and white	Color	Washing machine	Clothes dryer	erator or freezer	Dish- washer	condi- tioner s
1960									
All households	75.0	16.4	86	.7	74.5	17.4	86.1	4.0	12.8
Annual Income: 8									
Under \$1,000	24.8	1.8	49		48.1	1.4	70.2	0.3	2.7
\$1,000-\$1.970	42.9	2.1	71		58.6	3.4	77.6	0.6	4.6
\$2,000-\$2,909	61. 3 75. 7	6.4	80		67.6	5.9	82.5	1.2	6.2
\$3,000-\$3,993 \$4,000-\$1,999	82.3	12.3	. 92		73.3	9.6	84.9	1.5	9.3
\$5,000-\$5,979	90.2	17.9	94.		77.3 82.8	14.9	86.3	2.0	9.0
\$5,000-57,499	93.3	21.6	97		85.6	20. 5	90.7	2.5	12. 2
\$7,500-\$9,999	95.1	31.4	96.		85.9	30.0	92.6	7.6	17. 3 20. 3
\$10,000-\$14,993	95, 4	42.7	97.		84.9	- 38.6	92.0	18.3	27. 5
\$15,000 and over	94.2	88.8	98.		86.5	50.3	93.7	43.4	42.2
1969				3			-		
All households	79.6	29.0	79.0	31.9	70.0	35.0	82.6	13.7	4 20, 5
Annual income: 3	- 1		- 1			- 1	- 1	- 1	
Under \$3,600	44.7	4.7	77.5	9.5	49.8	9.6	75.0	2.6	14.3
\$3,009-53,999	67_0	10.0	83.5	16.9	60.9	17.6	76.8	4.6	112.0
\$4,000-51,9:9	76.8	16.4	81.4	22.1	62.9	22.0	78.1	3.7	4 14.7
\$5,000-\$5,999	84.5	19.4	78. 2	27.8	66.0	29.6	77.8	6.9	4 18.9
\$6,000-\$7,499	90.0	28. 9	78.4	33.8	75.1	41.4	84. 4	10.0	4 21. 6
\$7,500-\$9,999	94.1	37.8	77.8	39.9	79. 2	47.9	87.3	16. 8	4 28, 5
\$10,000-\$14,999	96.5 96.5	50.9	78.3	48.2	84.6	63.4	90. 2	30.0	4 33. 7
\$25,000 and over	96.7	62.3	81. 2 83. 3	55.0	85. 5	71.7	90.0	52.1	444.9
\$20,000 Bild Over	WO. 7	00.1	53. 3	67. 2	90.4	80.1	91.8	72.7	* **. 5

For 1960, refrigerators only.
 Includes both room and central systems.
 Total money income (before taxes) of primary family or primary individual in 12 months immediately preced-ginterview.
 1967 data. Based on January 1967 sample survey. ing interview.

Source: Dept. of Commerce, Bureau of the Census; Current Population Reports, Series P-65, Nos. 18 and 28.



No. 672. Consumer CREDIT: 1950 to 1970

(In millions of dollars. Prior to 1960, excludes Alaska and Hawaii. Estimated amounts of credit outstanding as of end of year or month; extended and repaid, for entire year or month. See also Historical Statistics, Colonial Times to 1957, series X 415-422].

TYPE OF CREDIT	1950	1955	1960	1965	1966	1967	1968	1969	1970. Mar.
Credit outstanding	21, 471	38, 830	56, 141	90, 314	97, 543	102, 132	113, 191	122, 469	119,698
Installment	14, 703	28, 906	42,968	71, 324	77, 539	80, 926	89, 890	98, 169	96, 662
Automobile paper	6, 074	13, 450	17, 659	28, 619	30, 556	30, 724	34, 130	36, 602	36, 088
Other consumer goods paper	1,016	7,641	11, 545 3, 148	18, 565 3, 728	3,818	22, 395 3, 789	24, 899 3, 925	4,040	26, 814 3, 951
Personal loans	2,814	6, 112	10, 617	20, 412	22, 187	24,018	20, 936	29, 918	29, 809
Noninstallment	6,768	9,924	13, 173	18, 990	20,004	21, 206	23, 301	24,300	23, 036
Fingle-payment loans	1,821	3,002	4, 507	7, 671	7, 972	8, 428	9, 138	9,096	9, 054
Charge accounts	3, 367 1, 580	4,795 2,127	5, 229	6, 430	6, 686 5, 346	6, 968	7, 755 6, 408	8, 234 6, 970	6, 645 7, 337
Installment credit:									-
Extended	21, 858	38, 972	49, 793	78, 586	82, 335	84, 693	97, 053	102,888	8, 243
Repaid	18, 445	33,634	46, 073	69, 957	76, 120	81, 306	88, 059	94, 609	8, 473
Net change	3, 113	5, 338	3, 720	8, 629	6, 215	3, 387	8,964	8, 279	-230
Policy loans by life insurance		-							
companies 3	2,413	3, 290	5, 231	7, 678	9, 117	10,059	11, 306	13, 825	14, 535

Heldings of financial institutions; heldings of retail outlets are included in "Other consumer goods paper."

*Source: Institute of Life Insurance, New York, N.Y. Year end figures are annual statement asset values; month end figures are book value of ledger assets. These loans are excluded in consumer credit series.

Source: Board of Governors of the Federal Reserve System; Federal Reserve Bulletin, except as noted.



SA 13 CONSUMER INSTALMENT CREDIT

Cumulative Percentage of Repossessions on New and Used Cars Financed by Number of Instalments Paid, 1933-62 TABLE 34

Instalmente					Year of	fear of Repossession	noise			- 8	
Paid	1933-37	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
New car repos	sessions				1			7			
0	13.5	14.2	12.4	15.6	12.3	11.2	8.0	10.4	8.6	6.1	7.8
-	25.6	25.2	22.5	27.9	22.2	20.2	14.6	18.1	15.5	11.2	14.0
23	38.3	35.7	32.1	38.9	32.1	29.1	22.0	25.4	22.8	16.6	20.0
•	50.2	45.6	40.8	48.9	41.3	36.7	29.4	32.0	29.9	22.2	25.9
-	60.9	55.3	49.2	57.5	50.1	43.8	36.6	38.0	36.7	27.6	31.4
	10.1	63.6	56.8	65.0	58.0	50.1	43.6	43.3	43.0	33.2	36.5
	77.5	10.6	63.3	71.0	65.1	55.8	50.1	48.2	49.0	38.7	40.9
	83.3	76.7	68.9	75.7	71.1	61.0	56.2	52.6	54.5	43.9	45.1
	87.7	82.3	74.1	80.0	76.4	62.9	61.7	56.5	59.5	49.0	48.9
6	91.3	87.0	78.6	83.8	80.9	70.3	66.5	60.3	64.2	53.8	52.7
10	100.0	91.0	82.6	6.98	85.0	74.6	71.0	63.9	68.6	58.4	56.5
"		94.2	96.6	89.5	88.4	78.6	75.2	67.8	72.9	62.9	60.1
12 and over		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0



SA 14

LOSS EXPERIENCE

Instalments					Year of	Year of Repossession	aoles				
Paid	1933-37	1953	1954	1955	1056	1057	0300				
				2000	0001	1836	1828	1959	1960	1961	1962
Used car repos	sessions							*			
0	23.0	20.4	16.8	20.8	18.7	9	17.0				,
_	41.6	37.1	30 8	36 0	300	0.00	20.00	19.1	16.1	13.0	15.4
~	680	81.8		0.00	600	23.3	30.5	32.7	28.7	23.0	27.3
		01.0	40.4	50.3	46.3	46.0	42.0	44.8	40.3	30 8	27.0
, ,	71.3	63.4	54.1	61.5	57.1	56.3	51.9	54.0	80.0		
	81.0	72.8	63.3	70.3	66.1	0.19	0		3.00	41.1	2.1.5
ın	88.0	200	200			0.50	9000	03.0	58.9	49.0	55.1
•	200		20.0	2.2	13.4	71.8	68.2	69.8	66.1	56.1	617
	1.28	80.1	4.77	82.9	79.6	77.7	74.6	75.2	2 64	B 2 E	
	95.7	90.4	82.7	87.0	84.5	82.9	200	0 0	2 1	0.20	4.10
00	97.6	93.4	87.0	000	00		0.00	0.61	0.11	2.89	72.0
	08 7	06.7		9 0	00.0	80.0	64.0	83.6	82.0	73.1	75.9
-			90.0	97.0	91.4	88.9	87.3	86.6	85.5	77.5	79 4
	100.0	81.3	93.2	94.4	93.7	91.3	0.06	89.2	200	010	
-		98.3	95.2	95.8	95 3	03.0	000			01.0	4.79
12 and over		100 0	1000	000		2.00	26.3	2.16	80.8	84.5	85.0
		200	100.0	100.0	100.0	100.0	100.0	100.0	100.0	1000	100 0

Source: Figures for 1933-37 are from W. C. Plummer and R. Young, Sales Finance Companies and Their Credit Practices (New York: Nat. Bur. of Econ. Research, 1940), Table 34, p. 161. A large sales finance company supplied the data for 1953-62. *Ten months and over.



SA 15 LOSS EXPERIENCE

TABLE 35

New and Used Car Reposessions in Relation to Contracts Written, 1953-61

Date of Contract	Firs trac	sessions during st Year of Con- t in Relation to counts Written Percentage)	First tract i	ssions during Year of Con- n Relation to Reposessions	Estimate of Total Repossessions in Relation to Ac- counts Purchased (Percentage)
New cars	4	9			
1953		1.6*	- 1	86.6	1.8
1954		1.9		89.5	2.1
1955		2.8		88.4	3.2
1956		4.0		78.6	5.1
1957		5.8		75.2	7.7
1958		4.5		67.8	6.6
1959		4.6		72.9	6.3
1960		4.6		62.9	7.3
1961		3.61		60.1	6.0
Used cars			1 1		
1953		12.1*		95.2	12.7
1954		10.1		95.8	10.5
1955		10.9		95.3	11.4
1956		11.5		93.2	12.3
1957		12.9	-	92.3	14.0
1958	9	11.2		91.2	12.3
1959		11.8	, ,	90.9	13.0
1960	-	13.4		84.5	15.9
1961		10.5†		85.0	12.4

^{*}Based on 8 months of 1953.

[†]Based on 11 months of 1961.

Source: A large sales finance company.

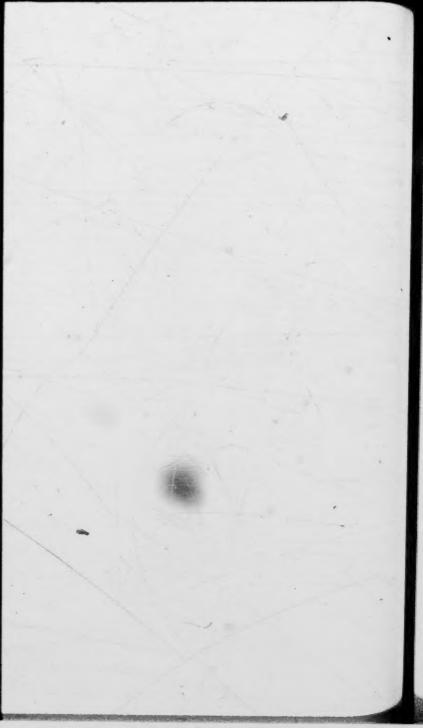


TABLE F-5

							V	Area						
	4	В	O	. Δ	E	Ēt,	O	H	-	٦	×	1	Average of 12 Areas	
1953					1			1	1					
Jan.	1.3	1.0	1.6	1.6	8.0	8.0	8.0	1.5	2.1	0.0	0.7	0.8	1.2	
Apr.	1:1	0.8	1.8	1.5	9.0	0.5	1.0	1.3	1.1	0.8	9.0	0.8	1.0	
July	1.3	6.0	2.1	1.7	6.0	0.5	8.0	1.4	1.3	6.0	8.0	1.1	1.1	A
Oct.	1.7	Ξ	2.5	2.4	1.9	9.0	-	2.5	1.8	1.3	1.3	1.2	1.6	PP
1954	1													end
Jan.	2.9	1.8	4.3	.3.9	3.6	1.4	2.7	4.3	33	2.4	5.9	2.5	3.0	ix
Apr.	2.3	1.1.	3.0	2.3	1.5	. 0.7	1.7	3.0	1.8	1.7	1.9	1.5	1.9	F
July	.2.3	6.0	2.1	1.8	1.9	8.0	1.2	3.3	1.9	1.9	1.6	1.4	1.8	
Oct.	3.3	1.3	60 FU	2.4	1.8	1.2	1.8	4.0	2.3	2.5	1.9	1.8	2.3	
1955										-				
Jan	8.8	1.8	5.1	3.4	5.0	. 2.1	2.5	4.9	2.9	2.9	2.4	2.5	3.0	
Apr.	2.6	=	4.2	2.4	1.6	1.3	1.2	3:9	2.1	2.3	1.3	1.5	2.1	
Annual averages														
1953	1.4	1.0	5.0	1.8	1.0	9.0	8.0	1.6	1.6	1.0	6.0	1.0	1.2	
1954		1.3	3.4	2.6	2.5	1.0	1.8	3.6	2.4	2.0	2.1	1.7	2.3	
1955 (Jan. & Apr.)	3.5	1.4	4.6	2.9	1.8	1.7	1.7	4.4	5	2.6	8	0 6	2 0	

SA 16



Quality of Consumer Instalment Credit

Notes To Table F-5

Note: Inasmuch as the estimated repossession rates presented in this table have been utilized extensively in the text, it is appropriate to describe the method used for estimating repossession rates and the reasons why such estimation was necessary.

Repossession, if it is to occur, does so over a period of time after the purchase of an automobile; the down payment and maturity information presented as of the end of a year cannot properly be related to the actual repossession data for the same calendar year. Nor could any simple lagged relation significantly improve the correspondence.

The National Bureau obtained information from a large sales finance company indicating nationally the number of instalments paid before repossession occurred. About 89 per cent of all repossessions occur within the first year. By assuming arbitrarily that the rest occurred within the second year very little distortion was introduced by extrapolating the known time distribution for the first year and it was possible to obtain the following percentage distribution of the proportion of repossessions which would have occurred every three months for two years following the purchase of a car:

	Perc	entage	of All Repo	ssessions
Number of Instalments Paid		00	curring fro	m
Prior to Repossession		Date o	of Loan Pur	chase
0-2 (1st Q)			34.3	12
3-5 (2nd Q)			26.0	
6-8 (3rd Q)			17.6	
9-11 (4th Q)			11.3	
12-14 (5th Q)			6.8	211 1 1
15-17 (6th Q)			3.0	
18-20 (7th Q)			.5	
21 and over (8th Q)			.5	
			100.0	

These percentages were utilized as a moving sum in order to relate the number of repossessions to the time the loans were purchased. This method of weighting the repossession data was tested with aggregate data and found to be superior to any simple lagged method of estimating repossession rates as of the time the loan was purchased both for new-and used-automobile loans. Hence it was applied to the local area data to estimate repossession rates as of the time loans were purchased.

Because of the utilization of the moving sum method, the last three months (October, January, April) are subject to increasing error in the estimate due to the fact that the two year (8 point) moving sum is based on seven, six, and five observations respectively (adjusted to 8-point coverage). This means that a small fraction of loans is lost in the estimates, which understate the repossession rate estimate.



IN THE

& ROBERT SEAVER, CLERK

Supreme Court of the Anited States

OCTOBER TERM 1970

NO. 70-5039

MARGARITA FUENTES,

Appellant,

vs.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER CO.,

Appellees.

BRIEF OF APPELLEE ROBERT L. SHEVIN

ROBERT L. SHEVIN ATTORNEY GENERAL

DANIEL S. DEARING CHIEF TRIAL COUNSEL

Dept. of Legal Affairs The Capitol Tallahassee, Fla. 32304

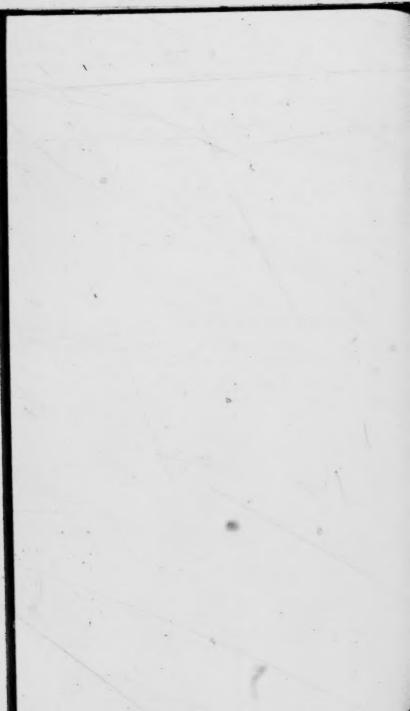


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OCTOBER TERM 1970

NO. 70-5039

MARGARITA FUENTES,

Appellant,

vs.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

BRIEF OF APPELLEE ROBERT L. SHEVIN

STATEMENT OF THE CASE

Appellee Robert L. Shevin, Attorney General for the State of Florida,

respectfully disagrees with the Statement of the Case as presented in Appellant's Brief, not for reason of inaccuracy, but for failure to set out in detail facts which put this controversy into proper perspective. The following statement is based upon the Stipulation considered by the court below (A 24-29).

Appellant, Mrs. Margarita Fuentes had made six installment purchases from Firestone on time-payment contracts previous to the one giving rise to this action and had paid for them. Although Appellant was unable to stipulate to the following details which describe these installment purchases, Firestone contends the following based upon its credit records:

Mrs. Fuentes applied for credit with Firestone on January 31, 1964. She represented herself as a 49-year-old divorcee who had lived at 137 S.W. 10th Avenue, Miami, for five months. She had been employed by Geneie of Miami, an apparel factory, for one and a half years as a sewing machine operator. She was paid \$60.00 per week. She had very good credit reference with Ideal Trading Co., Inc., which indicated a credit history dating from 1962. Firestone approved her. The next day she bought a console T.V. and took out a service policy. A year later, she bought a toaster, and in the fall of the following year, she bought a refrigerator.

On October 30, 1965, Mrs. Fuentes

opened another account with Firestone. Her address was then 1275 S.W. 1st Street. She purchased two bicycles. She paid for them in fourteen installments.

She next applied for credit with Firestone on March 29, 1967. She represented that she had rented a home at 112 S.W. 11th Avenue, Miami, Florida, for longer than a year, and that she had been employed by Mr. Dino's as a sewing machine operator for a year with a monthly salary of between \$300.00 and \$399.00. Her credit references and employment were verified. A credit limit was granted of \$495.00.

On June 24, 1967, Mrs. Fuentes purchased from Firestone a gas stove for \$139.95 together with a \$14.95 policy assuring her free service for one year. With sales tax of \$4.66, handling charges of \$20.67 and documentary stamp of \$.30, the total time balance was \$180.53, to be paid in 17 equal installments of \$11.00 (A 24-25).

During the course of approximately one year from the date of her purchase, Mrs. Fuentes complained on more than one occasion of mechanical problems with her stove. Firestone asserted that satisfactory repairs were made which included replacement at no charge to Mrs. Fuentes of stove burners. Mrs. Fuentes alleged that if such repairs were made, they were not made to her satisfaction. Firestone denied this allegation (A 25).

On November 27, 1967, Mrs. Fuentes purchased from Firestone a Philco stereo set for \$398.75 and a service policy of \$12.50. Documentary stamp charges of \$.90 and sales taxes of \$12.47 brought the net cash price to \$424.62. A down payment of \$40.00 was made, leaving a net cash balance of \$384.62. The balance remaining unpaid on her gas stove (\$136.53) less a refund of part of the handling charge (\$10.20) brought the total cash balance for both the gas stove and stereo to \$510.95. To this was added a new handling charge of \$101.80 for a total time balance of \$612.75 for both the gas stove and stereo, to be paid over 24 months commencing December 2, 1967. Each installment was to be in an amount of \$26.00 (A 24).

On February 6, 1968, Mrs. Fuentes made a payment in the amount of \$30.00. She made \$30.00 payments on March 15, and April 9. On May 21, she made a \$26.00 payment, and on June 5, a \$6.00 payment. On July 3, she paid \$20.00. On July 15, she made a payment of \$208.70 (A 24).

The effect of this last payment was to prepay installments through March, 1969. The required April, 1969, installment payment in the sum of \$26.00 was not made. A notice was mailed to Mrs. Fuentes The required May, 1969, installment payment in the sum of \$26.00 was not paid. A telegram was sent to her on May 12, 1969, to the effect that she was required to pay the past-due account of \$204.05 that day, or return the merchandise. The

form telegram was sent by the store credit manager, Mr. John D. Daley. She failed to pay (A 25-26).

On September 15, 1969, Firestone filed in the Small Claims Court in and for Dade County, Florida, under Case No. 205376, the following pleadings:

- A. Statement of claim.
- B. Affidavit in replevin.
 - C. Replevin bond.

On September 15, 1969, the date of filing the foregoing pleadings by Firestone, Mrs. Fuentes had not made certain payments according to the conditional sales contract. She was then indebted to Firestone in the total sum of \$204.05 as the balance due upon the total purchase price for the gas stove and stereo (A 26).

On September 15, 1969, the Clerk of the Small Claims Court in and for Dade County, Florida, pursuant to the afore-listed pleadings, issued a writ of replevin. Said writ of replevin was delivered on the same date to the office of the Sheriff of Metropolitan Dade County, Florida, for service upon Mrs. Fuentes and execution upon the gas stove and stereo pursuant to the provisions of Chapter 78, Florida Statutes, 1967 (A 26).

On September 15, 1969, at approximately 5:00 o'clock p.m., Robert Arthur Williams, a Deputy Sheriff in the office of the

Sheriff of Metropolitan Dade County, went to the residence of Mrs. Fuentes, located at 112 S.W. 11th Avenue, Miami, Florida, to serve upon Mrs. Fuentes the statement of claim and the writ of replevin and to execute the writ of replevin upon the gas stove and stereo. Two employees of Firestone, Mr. David Daley and Mr. Ricardo Rodriguez, met Deputy Williams at this location with a Firestone truck (A 26-27).

Upon arrival, Deputy Williams went to the door of the Fuentes residence. main front door was open. A screen door was closed. A woman and two boys were in the living room. Deputy Williams knocked on the door. He asked in English to see Mrs. Fuentes. The person who came to the door was Leonor Delgado, the appellant's daughter-in-law. She does not speak English and apparently did not understand Deputy Williams. At this point, the stories of the parties differ. Deputy Williams alleges that two small boys, Hugo Delgado, age twelve, and Ricardo Delgado, age ten, were within the house and, both being bi-lingual, understood him and invited him in at that time and he entered the living room pursuant to this invitation. Mrs. Fuentes concedes that the boys were within the house and that they are bi-lingual, but denies that the Deputy Sheriff entered the home at Her contention is that Deputy that point. Williams stayed on the porch at this time while the parties spoke through the screen door. She admits and contends that Deputy Williams was invited into the house and entered the house only after Mr. Leon, her

son-in-law, later arrived at her home (A 27).

Deputy Williams mistook Mrs. Delgado for Mrs. Fuentes. Mrs. Fuentes was in the living room at the time. He identified himself and announced that he was there to repossess a stove and a stereo set for Firestone. He showed them the writ and the statement of claim and explained that he was there under court order to pick up the merchandise. was a difficult communications problem. Neither of the two women seemed to him to speak or understand English. The two boys translated. Gradually, Deputy Williams was able to communicate his purpose and the effect of the writ and statement of claim (A 27).

Mrs. Delgado, who also lived in the house, then became "upset and emotional." She protested the repossession. She asked for Mrs. Fuentes to contact Joaquin Leon, Mrs. Fuentes' son-in-law, who would assist her in the matter. Deputy Williams agreed to wait (A 27-28).

At the request of Mrs. Fuentes, Mr. Leon immediately left work and drove the two blocks from his place of business to the Fuentes residence. He introduced himself in English to Deputy Williams. He explained that his attorney had advised him that a court proceeding was necessary before the merchandise could be repossessed, and that, on his advice, he was not going to give up the property (A 28).

Deputy Williams explained the effect of the writ to Mr. Leon, that he was obliged to repossess the stove and stereo in accordance with its terms. According to Mrs. Fuentes, Mr. Leon then agreed that the Deputy Sheriff, Mr. Daley and Mr. Rodriguez could come into the house and repossess the merchandise. It was indicated to Deputy Williams that the stereo was in the living room and that the gas stove was on an open porch at the back of the house (A 28).

Mr. Daley and Mr. Rodriguez of Firestone had parked the Firestone truck in the driveway of the Fuentes residence and were waiting outside on the front porch. Deputy Williams called them into the living room where he pointed out the stereo. He also directed them to the gas stove. The two men picked up the stereo, took it outside, and loaded it on the truck. They then went to the rear of the house to pick up the gas stove. It was not connected in any way to gas lines or to the house. They carried it to the front and loaded it upon the Firestone truck. Another stove was located in the kitchen of the Fuentes home at the time that Daley and Rodriguez picked up the stereo and gas stove for Firestone (A 28).

Neither Daley nor Rodriguez had any conversation with anyone inside or outside of the Fuentes home other than Deputy Williams. After Mr. Leon agreed that Deputy Williams could repossess the merchandise, no one objected to Daley or Rodriguez repossessing the stove and

stereo. The only conversation which they had with Deputy Williams was, first, in the living room of the Fuentes home, wherein Deputy Williams directed them to the items to be replevied, and, second, on the front porch of the Fuentes home, after they had loaded the merchandise onto the truck, when Deputy Williams requested Mr. Daley to sign a receipt to the Sheriff's office for the gas stove and stereo (A 28-29).

QUESTIONS PRESENTED

I

Whether a statutory scheme of replevin, commencing with judicial process, providing for prejudgment taking of goods into custodia legis, upon posting a bond in double the value of said goods, and providing for a judicial hearing on the merits and recovery to the prevailing party, violates standards of Fourteenth Amendment due process.

II

Whether a statutory scheme of replevin providing authority for officers of the court forcibly to gain entry to a dwelling, building, or other enclosure if necessary, entry having been refused upon demand, for the purpose of executing a writ against specific personalty violates the Fourth Amendment prohibition against unreasonable search and seizure.

SUMMARY OF ARGUMENT

I

Florida's statutory scheme of replevin is not violative of Fourteenth Amendment due process.

Appellant cites inequitable practices of a few to condemn the entire fabric of installment buying. The repossession of household "necessities" judicially forbidden in Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) and the garnishment of wages in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) should be recognized as exceptions to general practices of consumer credit. no case should Florida's replevin statute be invalidated for reasons described in these cases. Appellant refuses to recognize the salutary effect of the replevin remedy upon our consumer-oriented economy. Relying chiefly upon Sniadach v. Family Finance Corp., supra, Appellant launches her attack upon 700 years of a judicially sanctioned remedy. She depends for success upon this Court's willingness to extend the rule of Sniadach into every instance of prejudgment action brought to protect a creditor interest.

It is the position of the undersigned that the facts of this case do not warrant the result Mrs. Fuentes urges, that the replevin remedy is important to the interests of the State, and that Appellant's reliance upon <u>Sniadach</u> is misplaced.

The history of replevin demonstrates its vitality today. It should not be discarded merely because it is an ancient remedy. Centuries of acquiescence to the remedy in our jurisprudential system indicate validity, not invalidity of the statute. Rather than an archaic buttress to the established order of things designed to favor the rich, the remedy was developed to avoid necessity for self-help in a dispute over the right to possess property. A common-law remedy, statutory enactments are enlarged, rather than restricted, by case law. It is one of the most important forms of action known to our jurisprudence.

The Florida Statute has been reviewed and amended four times within the past two decades.

The purpose of the remedy is to protect property during a judicial dispute over ownership, and, by taking the chattel into custodia legis, preclude necessity for self-help. In its broader sense, the remedy is a vital factor in our consumer-credit economy. Both of these purposes give rise to strong state interest.

Despite Appellant's contention to the contrary, both notice and a meaning-ful opportunity for hearing "appropriate to the nature of the case" are provided in Chapter 78, Florida Statutes (1969). Weighing the governmental function of protecting property of its citizens and maintaining its economy against the individual's possible temporary loss of

possession of a chattel pending a judicial determination of the merits, the inescapable conclusion is that Florida's Replevin statute offends no Fourteenth Amendment Standard.

The rationale of <u>Sniadach</u> is not appropriate to this case. There is a significant difference between Wisconsin's garnishment laws and Florida's replevin statute, and critical distinctions between the status of the party's rights affected, and type of property involved between the two cases. Moreover, wages garnished in <u>Sniadach</u> were, by definition, owned by the debtor. In the instant controversy, the ultimate rights to own and possess the stove and stereo, or to be paid for them, were, by contract, in Firestone Tire and Rubber Company.

To the extent that the remedy of replevin affords mass-production, installment buying and lower prices as a result, Mrs. Fuentes is a beneficiary of the system she seeks to attack. While neither Sniadach nor Goldberg vs. Kelly, 397 U.S. 254 (1970) could adversely affect the consumer -oriented economy, reversal of this case would have severe repercussions on our economic system.

In view of established judicial approbation of the prejudgment action described herein, it must follow that there is no Fourteenth Amendment violation reflected in Florida's replevin statute.

II

Facts before the Court do not warrant consideration of the Fourth Amendment questions raised by Appellant. The District Court found there to be no Fourth Amendment question raised by the facts before them, nor is there one here. To determine a Fourth Amendment issue when it is not properly before the Court in a matter as far-reaching is this one, is tantamount to stretching jurisdiction of the Court far beyond matters in controversy before it.

But even if the facts warranted consideration of §78.10, Florida Statutes (1969), providing forcible entry, after public demand has been refused, when the chattel to be replevied has been concealed or secreted in a dwelling, Appellant has not accurately described effects of the statute. It does not speak to remedies for mere absence from homes when public demand for entry is made, but to willful attempt to frustrate service and effect of the writ.

Execution of the replevin writ under circumstances when property is intentionally concealed from the sheriff is not unreasonable search and seizure. The writ must describe specific chattels, it must be served upon a specifically designated individual at a specifically described address. The statute limits authority of the sheriff to well within reasonable bounds.

Case law supports Florida's statute against Fourth Amendment attack. Several Supreme Court and lower court cases stand for the proposition that entry upon premises by an officer for the purpose of seizing goods under authority of a judicial writ such as replevin is not forbidden by the Fourth Amendment. Boyd v. United States, 116 U.S. 616 (1866); American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Davis v. United States, 328 U.S. 582 (1945)

The issue is not whether entry is in the context of criminal or civil action, but whether it is, as under the circumstances of the instant case, <u>reasonable</u>.

The District Court found there to be no substantial Fourth Amendment question and no Fourteenth Amendment violation. It should be affirmed.

ARGUMENT

I. Fourteenth Amendment due process does not forbid prejudgment action under a conditional sales contract to assert a prior right of possession of personalty pending trial as provided in Florida's statutory replevin scheme.

A. Preliminary Statement.

While broadening application of the subject statute to factual situations not before the Court, appellant and opposing amici have set narrow limits to their appreciation of (1) the history of replevin, (2) its purpose, and (3) state interest expressed in the statutory scheme of Chapter 78, Florida Statutes (1969). The horizons of their treatment of replevin are picketed by exceptions and fenced in by inequitable practices which, while common to the inner-city experience, are no more illustrative of the rule of consumer credit economy than Warhol's Campbell Soup describes the scope of modern of art. There is more to installment buying than repossessing Mrs. Laprease's bed or halving Mrs. Sniadach's wages just as there is more to the legal profession than sharp practice and more to the banking business than usurious interest charges. To condemn Florida's statutory scheme of replevin for the sins of Wisconsin's garnishment law on the ground that both are infected by the same germ is to throw the baby out with the bath water because both needed changing.

Sensational exceptions are raised to attack the rule. Appellant and opposing amici categorically refuse to recognize the salutary effect of replevin within our installment credit economy. Dazzled by unfair activities of a few urban merchants, they obstinately ignore the obvious: that, although ancient in antecedents, replevin has changed, both in purpose and procedure, from the Statute of Marlbridge, 52 Henry III, Ch. 21 (1267); that reasons for its use today are constructive requisites to an orderly society; and that the state has such a strong interest to protect by Ch. 78, Florida Statutes, that if replevin had not existed before our time, we would have had to invent it to keep pace with demands of the consumer.

Through the Sturm und Drang of legal argument fired broadside from briefs of Appellant and opposing amici there recurs one question of major implication, and that is: how far does this Court intend to extend the thrust of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)? Appellant's attack is launched from the opinion handed down in that case. If the attack is to be sustained, the Court must affirmatively decide that due-process lessons of Sniadach apply to every instance of pre-judgment action against a debtor. For that is what is involved here: prejudgment service of a writ commanding the servor to take certain specifically described property into custodia legis pending a judicial determination as to which of the two parties had the greater right to possess and use the property.

It is the position of Appellee Robert L. Shevin, that questions raised by Appellant go far beyond the controversy decided by the District Court and should not be considered here, that the history of the legal action of replevin demonstrates its importance to our jurisdiction, that its purpose is important to a productive consumer economy giving rise to a strong state interest, and that the lessons of Sniadach vs. Family Finance Corp., supra, and Goldberg vs. Kelly, 397 U.S. 254 (1970), while validly applied to peculiarities of the type of vested property interest in those cases, are inappropriate to a consideration of the instant appeal.

B. The History of Replevin Describes Its Vitality.

Replevin statutes have been in force in Florida as codified law since 1845. Before then, replevin was accepted procedure under English common law. earliest authority cited in Florida, Collins v. Mitchell, 5 Fla. 364 (1853); Branch v. Branch, 6 Fla. 314 (1855); Richardson v. Hutchinson, 20 Fla. 21 (1883); Holliday v. McKinne, 22 Fla. 153 (1886), indicates that, except for one clearly marked detour, the basic remedy (and repossession-of-personalty reason for it) hasn't changed much in more than 700 years. Compare Statute of Marlbridge, 52 Henry III, Ch. 21 (1267); Poole v. Longuevill, 3 Saunders Rep. 281 (1680); Shannon v. Shannon, 1 Sch. & Lef. 324 (1804); Chitty's Blackstone, Vol. II, p. 116 (1892); 3 Blackstones Com. 146, with Harman-Hull Co.

v. Burton, 106 Fla. 409, 143 So. 398
(1932); Hughes Trust & Banking Co. v.
Consolidated Title Co., 81 Fla. 568, 88
So. 266 (1921); Delacruz v. Peninsula
State Bank, 221 So. 2d 772 (Fla. 2nd Dis.
1969); Bringley v. C.I.T. Corp., 119 Fla.
529, 160 So. 680 (1935); Bell v. Niles,
61 Fla. 114, 55 So. 392 (1911). The
detour is that Florida combines the common
law action of detinue with the end sought
in replevin, and uses Chapter 78, Florida
Statutes (1969) to accomplish both ends.
Miller v. Townhouse Development Corp.,
178 So. 2d 730 (Fla. 3rd Dis. 1965).

Today, in certain quarters, there is an apparent impatience with common-law remedies. The tendency is to treat a vintage remedy such as replevin as little more than an anachronism. Because it is old, it is deemed to be useless; an historical curiosity, ill-suited to cope with legal problems of sweeping social change. Because it has come down to us through ages of English common-law respect for property and the rights of propertyowners, replevin is immediately suspect by some as no more than an archaic buttress to the established order of things. view is implicit throughout briefs of Appellant and opposing amici heretofore filed. It is submitted that, while superficially scintillating, this attitude toward a 'time-honored' remedy overlooks hard facts of commercial life. It also denies lessons of case law. If anything, presumptions in favor of the constitutionality of a statute are particularly strong where such constitutionality has

long been acquiesced in. Cf. Life & Casualty Ins. Co. of Tenn. v. Barefield, 291 U.S. 575 (1934); Life & Casualty Ins. Co. of Tenn. v. McCray, 291 U.S. 566. Continued and unquestioned operation of a statute is entitled to weight and is highly persuasive of validity. Corn Exchange Bank v. Coley, 280 U.S. 218 (1930). As the Supreme Court of Florida has noted, old age alone is not sufficient to invalidate a statute. Statutes are not declared unconstitutional unless they conflict with the Constitution. McNeil vs. Webeking, 66 Fla. 407, 63 So. 728 (Fla. 1913).

The remedy developed not to oppress the poor by repossessing property belonging to the rich, but to step in between two disputants and, by taking the property into custodia legis, preclude any urgent necessity for self-help on the part of either party or both. According to some authority it was developed to protect chattels of tenants from wrongful taking by their lords. T.F.T. Plucknett, A Concise History of the Common Law, 368 (5th ed. 1956); W. S. Holdsworth, A History of English Law, 284 (3rd ed. 1927).

Like most English common-law remedies, replevin was a legal machination devised to avoid a fuss. Courts weren't interested in helping the claimant keep his chattel, but in helping the king keep the peace. Cobbey on Replevin, Sections 1, 20 (1900). In discussing historical developments of the remedy, Cobbey states in Sec. 1, page 2:

"And the writ as used to-day, though one of the oldest writs known to the law, is just as much a matter of statute in its practical use and application as writs which were created by statute -- with this difference: that while statutory writs are said to be in derogation of the common law, and the cases to which they apply must therefore be strictly limited to those covered by the legislative intent, the writ of replevin is a common-law remedy, and statutory enactments in regard thereto are said to be in aid of the common law. and therefore the class of cases to which such enactments apply will be enlarged rather *** than restricted. This tendency to enlarge the scope of the writ still exists, as is shown by recent legislative enactments and judicial constructions. In some states to-day an action of replevin may develop into a suit for damages pure and simple. In others, an action to replevy personal property may be transformed into an equitable action to determine the title to the land which produced the personal property. Equitable principles should be applied in a replevin case. And in many states it may now be used to try the title as well as the right of possession of personal property. So that,

all things considered, it is one of the most important forms of action known to our system of jurisprudence."

Sec. 20, page 11 of the treatise is also appropriate to this controversy.

"§20. Importance of the action .--It is the only remedy for settling the right of possession of specific chattels. When we consider that the greater part of the wealth of the world is in personal property, we see at once the importance of this Both the legislatures and action. the courts have recognized its importance; and through their aid, what was in its origin a half civilized contest, in which brute force was a prominent factor, has grown and developed, with the growth and development of civilization, into an ever-ready instrument for the solving of the intricate problems arising out of the possession and ownership of such vast wealth. The peculiarities of the action also render it important. It is the only form of action where, on an ex parte showing by affidavit, property, the thing in controversy, is placed in the care of the plaintiff at the commencement of the litigation. For this reason the remedy has frequently been called a violent one; but the frequency with which it is appealed to, and the fact that

the tendency of both the courts and the legislature, for the last one hundred years, has been to enlarge rather than restrict the scope of the action, not only shows that no evil effect has followed this feature of the action, but also evinces its importance and necessity."

Legislative history of the Florida statute discloses that the statute which Appellant would shrug off as archaic is paradoxically vital. The statute has been amended four times within the past two decades. Ch. 28277, §1, Laws of Florida, 1953; Ch. 29706, §1, Laws of Florida, 1955; Ch. 63-152, Laws of Florida, 1963; Ch. 67-254, Laws of Florida, 1967. This indicates considerable legislative interest. It also demonstrates a goodfaith effort to keep pace with gradual changes in the State's commercial development.

Sections of the latest amendment to Chapter 78, Florida Statutes (1969) are before the court in this case. The controversy does not warrant judicial consideration of the entire statute, despite Appellant's vigorous assertions to the contrary. But it most certainly challenges Florida's right to enact a statutory scheme such as that set out in Chapter 78, and that is perhaps the root of Appellant's complaint.

In this regard, it should be noted that Florida is the real party-in-interest

Appellee here. Firestone Tire and Rubber Company is merely the via media through which Appellant and opposing amici seek to tear down the national structure of installment credit buying. For it is not the inner mechanism of Firestone's credit operations that is under attack, but the right of the state to enact legislation providing for prejudgment repossession of personal property under a statutory scheme of replevin.

C. The purpose of replevin today is protection of property pending trial on the question of prior right to possession.

Within the context of facts before this Court, the purpose of the replevin remedy is preservation of personal property sold under a conditional sales contract pending a suit on the question of who has a prior right to possess the subject chattel. Protection of the property of its citizens and the economic life of its community are primary interests of the state. Therefore, a statutory scheme directed to these ends can hardly be dismissed as supportive of no significant state interest.

Mechanics of the economic factors affected by replevin are discussed in detail in the affidavit of Vincent G. Morgan (A 50-61). They are given judicial recognition in Epps vs. Cortese, 326 F. Supp. 127 (E.D.Pa. 1971) where at pages 135-136, a three-judge panel, discussing state interests in a replevin

context said:

"Clearly, the State has a countervailing interest in summary seizure by replevin which is to be weighed against plaintiffs' right not to be temporarily deprived of their property prior to a hearing on the merits. Initially, summary seizure conserves State financial resources and administrative time in reducing the number of evidentiary hearings in a given lawsuit. Additionally, the State and creditor interests coincide in providing a protective remedy for those who have retained title to or security interest in specific and unspeciallized property by authorizing procedures designed to prevent destruction, misuse or concealment of property by the debtor pending disposition. Adequate remedies made available to creditor interests are necessary to the preservation and continuation of retail credit upon which vast numbers of people must necessarily rely in a constantly inflated economy. To deny the creditor an adequate and practical remedy may deny the debtor of his only means of obtaining many widely accepted, but costly, items, the enjoyment of which should not be reserved to the wealthy. The preservation of adequate remedies is also necessary to the maintenance of many large and small retail businesses without which our economy might well

substantially decline to the detriment of the very individuals whom plaintiffs here seek to protect."

Clearly, the purpose of a statutory replevin scheme such as described in Chapter 78, Florida Statutes (1969) is salutary to areas of vital state interest and the proper subject of state concern.

D. Notice and opportunity for a hearing are present in Florida's replevin statute.

What is vital to due process within the perimeters of this controversy, was early defined by the Court as the opportunity to be heard in one's defense. Windsor v. McVeigh, 93 U.S. 274 (1876); Baldwin v. Hale, 1 Wall. 223 (1863); Hovey v. Elliott, 167 U.S. 409 (1897). Before one is deprived of property by adjudication, he must have opportunity for a hearing "appropriate to the nature of the case." Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). This requires that the opportunity be meaningful in time and manner. Armstrong v. Manzo, 380 U.S. 545 (1965). assumes absence of an extraordinary situation when an overriding governmental interest may justify postponing the hear-ing until after the event. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Ewing vs. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950);

Fahey v. Mallonee, 332 U.S. 245 (1947). As to the time and manner and opportunity for a hearing, Mr. Justice Jackson recognized "limits of practicability," Mullane v. Central Hanover Trust Co., supra, and these limits should be measured by the facts of the particular case.

In <u>Boddie v. Connecticutt</u>, U.S., 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971), Mr. Justice Douglas discussing due process noted in his concurring opinion:

"Whatever residual element of substantive law the Due Process Clause may still have * * * it essentially regulates procedure."

Also concurring, Mr. Justice Brennan quoted from Cafeteria and Restaurant Workers Union vs. McElroy, supra, and Goldberg v. Kelly, 397 U.S. 254 (1970):

"* * * [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Applying these due process requirements to procedures set out in the subject statute in light of the facts of this case, the inescapable conclusion is that no violation of the Fourteenth Amendment is presented here. The statutory scheme satisfies rudimentary principles of fairness.

No unconscionable hardship is worked on Appellant as was present in Sniadach v. Family Finance, supra. Mrs. Fuentes was no stranger to a conditional sales contract or to installment credit buying. She had signed several similar sales contracts (A 24). The agreement expressly authorized repossession of the stove and stereo to protect the vendor's security interest; no unfairness is reflected in this contract. No burdensome loss was suffered by Mrs. Fuentes--the stove had been replaced with a new one and was outside on an open porch exposed to the elements (A 28; 82), and the stereo can hardly be considered a necessity in the same category as Mrs. Sniadach's salary or welfare payments in Goldberg v. Kelly, supra. Moreover, the initial replevy by the sheriff under Chapter 78, Florida Statutes (1969), is neither final nor determinative of the defendant's ultimate rights in the controversy. It is determinative only of actual possession of the property for a three-day period during which the defendant may match the bond posted by plaintiff and regain possession pending outcome of trial on the merits of the question: which of the two parties has priority of possession. The hearing, as to claims of both plaintiff and defendant, is yet to come. It presents as meaningful an opportunity to be heard within the limits of practicability' as is appropriate to the nature of the case. The necessary ingredients of

due process are present.

E. The <u>ratio</u> <u>decidendi</u> of Sniadach v. Family <u>Finance</u> is not appropriate to this case.

Appellant insists that replevin violates the Due Process Clause because it provides for a taking of property (even into custodia legis) without a prior evidentiary hearing. She further insists that the rule of Sniadach v. Family Finance, supra, leads inescapably to this conclusion. Mrs. Fuentes ignores distinctions between statutes providing for prejudgment garnishment of wages and those providing legal processes for the immediate repossession of chattels. She also chooses to ignore the carefully drawn perimeters of the domain where Sniadach rules.

Sniadach dealt with pre-judgment garnishment of wages to satisfy a debt due under a promissory note to a loan company. We are here concerned with a retain-title contract for the conditional purchase of a gas range which Mrs. Fuentes had used and then voluntarily replaced, and a stereo phonograph which can hardly be considered to be a necessity of life.

Sniadach's perimeters are carefully staked by the Court's characterization of wages as a "specialized type of property presenting distinct problems in our economic system." Perimeters are also marked by the possibility of "loss of a job" and the overriding

consideration that garnishment presents a "great drain on the family income." Another boundary marker is recognition that garnishment of wages can "drive a wage-earning family to the wall." Underlying this domain is the foundation that ownership of and unrestricted right to use wages is undeniably in the wage earner. He has earned them. None of these socio-economic elements, expressly carved into the Sniadach opinion, are appropriate to a controversy arising out of the buyer's default under a conditional sales contract.

Moreover, the Wisconsin garnishment statute made no provision for indemnity by way of bond in the event the writ was ultimately determined to have been wrongfully issued. Yet bonding requirements of the Florida statute discourages whimsical use of replevin procedures for the purpose of taking undue advantage of one who has lost his right to possess the property. To this extent, the replevin statute affords a measure of protection absent from criminal search warrant procedures.

Balanced against the temporary deprivation of possession and use of property pending final adjudication of the merits, is the whole fabric of consumer installment buying. See, affidavit of Vincent G. Morgan (A 50-61). In a real sense, today's consumers are beneficiaries of the installment buying system to the extent that mass-production merchandising enables retailers to sell at lower prices.

If retailers are required to prosecute to judgment to prove their right to be paid in full for what they sell, without replevin machinery, the cost of such suits would be added to the price, reducing mass-production benefits to the consumer. In large measure, Mrs. Fuentes is a beneficiary of the system she now seeks to attack.

Neither Sniadach nor Goldberg v. Kelly, supra, had the capacity to completely undermine an economic system. Yet that would be the effect of reversal in the instant case. Reversal here would ignore countless conditional sales contracts and seriously cripple our consumer oriented economy. It would also ignore established case law which stands for the proposition that prejudgment action under an ex parte writ involving property rights --or rights equally precious--do not offend principles of due process of law. strong v. Manzo, 380 U.S. 545 (1965); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855); Davis v. United States, 328 U.S. 582 (1945); Phillips v. Commissioner, 283 U.S. 589 (1931); McInnes v. McKay, 127 Me. 110, 141 Atl. 699, per curiam aff'd, McKay v. McInnes, 279 U.S. 82 (1929); Coffin Bros. & Company v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1920); American Tobacco Co. vs. Werckmeister, 207 U.S. 284 (1907); Brunswick Corporation v. J & P, Inc., 424 F. 2d 100 (10th Cir. 1970); Epps vs. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), prob. juris. noted, 402 U.S. 994 (1971).

Mrs. Fuentes ignored her contract and now seeks constitutional authority for having decided not to pay for the goods she bought and used. The Due Process Clause should not be permitted to relieve dissatisfied customers from contractural obligations on grounds reflected in this record. For the Constitution protects contracts as well as the property which is the subject of them.

This Court reached a similar conclusion in McKay v. McInnes, supra, when it per curiam affirmed the Supreme Court of Maine in McInnes v. McKay, supra, which summarized the present question thus:

"But although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditioned and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied. (127 Me 110, 116)."

It is submitted that the rationale of Sniadach and Goldberg is not so elastic that it can be stretched out of proportion in an attempt to blanket all instances of prejudgment action against a debtor with due process prohibitions.

Florida's replevin statute provides meaningful opportunity for a hearing. The due process clause is not offended. On due process grounds the District Court must be affirmed.

8

II

The Fourth Amendment does not prohibit reasonable response to a conditional sales contract requiring repossession of goods by seller on default of payments by a buyer.

A. Facts do not warrant consideration of Fourth Amendment issues raised by Appellant.

Appellant and opposing amici confuse the way things are with the way they think things should be-to the detriment of the question raised by Mrs. Fuentes' decision not to pay for the stove she had bought. Facts become obscured or omitted from consideration altogether. Cut off, as it were, from their operative facts, issues blur easily. An essentially simple question has become confused and complex.

Throughout their briefs, Appellant and opposing amici ground their argument on a single premise, that the state has no legitimate interest to protect in passing a replevin statute which provides for breaking a close if the officer serving the writ has been denied access to 'secreted or concealed' property. Sec. 78.10, Florida Statutes (1969); and that, therefore, the replevin of goods from Mrs. Fuentes' house was violative of the Fourth Amendment. This, of course, is no part of the instant controversy. No close has been broken. The officer serving the writ in this case was not denied access. The mechanics of Sec. 78.10,

Florida Statutes (1969) were not summoned up. The premise upon which Petitioner has based her argument is made of the straw of conjecture.

Two members of the three-judge panel found on stipulated facts and testimony adduced in court that there was no Fourth Amendment problem before them (A 67-68). Procedures authorized by Sec. 78.10, Florida Statutes (1969) were not invoked.

A preliminary question, then, is whether a statutory toe-hold obtained through the fact of replevin involving a peaceable entry of Mrs. Fuentes' home, will enable Appellant to challenge the entire length and breadth of Florida's legislative scheme before this Court?

No doubt that final authority for testing constitutionality of Chapter 78, Florida Statutes, is vested in the judiciary, Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948), or that in a proper case, courts have not only the right but the duty to consider such questions, Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964), and to declare that invalid which is not minted in constitutional coin, Rosenberg v. United States, 346 U.S. 273 (1953). courts have no power independent of the proper case to reach into the statute book, review, and annul duly enacted laws of a sovereign state. Williams v. Riley, 280 U.S. 78 (1929); Horne v. Federal Reserve Bank of Minneapolis, 344 F. 2d 725 (8th Cir. 1965). Unless

testing the Fourth Amendment mettle of Chapter 78, Florida Statutes, became necessary during the course of judicial proceedings, and unless the issue is sufficiently raised in the facts, the Court should not undertake to assess validity of the law. Rosenberg v. Fleuti, 374 U.S. 449 (1963); United States v. Hayman, 342 U.S. 205 (1952).

For the power to declare a legislative enactment void is a delicate one to be exercised cautiously, reluctantly, Winters v. People of the State of New York, 333 U. S. 507 (1948); United States v. Brown, 381 U.S. 437 (1965), and only when such exercise is unavoidable. Ice Cream & Creamery Co. v. Andrews, 208 F. Supp. 899 (N.D. Fla. 1962) rev'd on other grounds, 375 U.S. 361 (1964). constitutional test must be absolutely necessary to a determination of the merits. United States v. Hayman, supra. Constitutional questions should not be considered abstractly, hypothetically, or conjecturally. Peters v. Hobby, 349 U.S. 331 (1955). For to anticipate constitutional problems not before the Court in the instant controversy in order to test a statute which was never applied is beyond the judicial prerogative; the law must be valid or invalid measured by operative facts before the Court. Lovett v. United States, 66 F. Supp. 142, 104 Ct. Claims 557, aff'd 328 U.S. 303 (1946). That which might happen, but hasn't, is not an operative fact. Prospective conditions may never arise. Determining a case as far-reaching

as this one on conjectural conclusions is tantamount to deciding crucial socioeconomic issues on the basis of mere abstractions. More is required. The issues must be measured in terms of specific facts in order that the Court may confine its decision to the case before it; Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); United States v. Raines, 362 U.S. 17 (1960), particularly when constitutionality of a statute is raised. United Public Workers v. Mitchell, 330 U.S. 75 (1947).

It is clear that the facts of this particular controversy do not warrant this Court's consideration of the Fourth Amendment issues urged by Appellant.

- B. A forcible entry to reposess goods in accordance with terms of a conditional sales agreement is not unreasonable and therefore not prohibited by the Fourth Amendment.
- 1. Assuming, arguendo, that Sec. 78.10, Florida Statutes (1969), were at issue in the instant case, assertions by Appellant and opposing amici that it permits the sheriff to make an 'exploratory' search or to rummage through the debtor's effects is misleading. At pages 29 30 of her Brief, Appellant describes the situation as follows:

[&]quot;* * * If the occupant is not at home when the officer calls, or

if he refuses entry, the officer is required to enter, by breaking with whatever force is necessary, and then to forage through the dwelling or building until he finds and removes the property. * * * *

This extraordinary interpretation reads requirements into Sec. 78.10, Florida Statutes (1969), that Appellee Robert L. Shevin, Attorney General of the State of Florida, is unable to find. The statute says nothing about the defendant being away from home. It speaks to property which is 'secreted or concealed'. The attendant meaning of those words describes a purposeful attempt to frustrate the writ, not to be innocently away from home. We must assume that statutes are applied in good faith (as the facts clearly indicate in this case) when we approach the question of their constitutionality. International Harvester Credit Corp. v. Goodrich, 132 N.Y.S. 2d 511, 284 App. Div. 604 (1954), affd. 124 N.E. 2d 339, 308 N.Y. 731, affd. 350 U.S. 537, 100 L.Ed. 729, 76 S.Ct. 621, (1955); Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 22 A. 2nd 397 (1941); cf. <u>Duke Power Co. v.</u> <u>Greenwood County</u>, 91 F.2d 665 (4th Cir. 1937), affd. 302 U.S. 485, 82 L.Ed. 381, 58 S.Ct. 306 (1938). There is nothing whatsoever in these facts to support Appellant's abstraction. Sec. 78.10, Florida Statutes (1969), is not a license to poach randomly through constitutionally protected domain. It is much tighter than Appellant -- without any factual support whatever -- argues it to be.

The writ orders the sheriff to replevy certain specifically-described property from the possession of a specifically-designated individual at a stated address (A 38). The statute requires this. Sec. 78.08, Florida Statutes (1969). Forcible entry to effect such replevin is permissible only when the property is 'secreted or concealed', and then only after public demand for delivery has been refused. Sec. 78.10, Florida Statutes (1969).

Thus an innocent defendant would not be subject to forcible entry under Sec. 78.10, but only the defendant who seeks to frustrate effectiveness of the writ by concealing or secreting the chattel and by refusing delivery upon public demand by an officer of the issuing court. In this posture, it is clear that the chattel is being detained wrongfully.

Execution of the replevin writ under such circumstances is hardly unreasonable search and seizure. The replevin defendant is aware of the obligation to pay his debt. He is made aware of the writ and attendant claim. He is aware that an officer is serving it. He is aware that specific property is involved which precludes necessity for any 'search' whatsoever. (It is incredible to suggest that executing a writ of replevin on a stove involves a "foraging" or "exploratory search" or a "rummaging through the debtor's effects.") Not only do the facts of this case fail to support a Fourth Amendment attack on the subject statute, but the statute itself is capable of its own

defense. It requires action and limits authority of the sheriff to well within the scope of reason.

2. Appellant argues that the Fourth Amendment impact is so fatal to replevin procedures reflected in this case that 700 years of accepted judicial practice came to an abrupt halt the instant Deputy Sheriff Williams stepped through Mrs. Fuentes doorway. The cases do not support this conclusion.

Murray v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1855), relied upon by the court below, is one of the earliest statements of authority. Summary processes for collecting debts due the government were at stake. The government's use of a distress warrant without supporting oath or affirmation was necessary to an effective program. Defendant contended that the warrant, used in this manner, violated the Fourth Amendment. Said the Court at 59 U.S. 285-286:

"* * * But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the act of congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or

seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause. * * *"

The next statement appeared in <u>Boyd v. United States</u>, 116 U.S. 616 (1866). The Court discussed differences between a general search, prohibited by the Fourth Amendment, and the more limited intrusion authorized by common law writs. In holding that entries pursuant to such writs are prohibited neither by the Fourth Amendment nor by the other Articles of the Constitution, the Court stated at 116 U.S. 624:

"* * * The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution. . . "

Since <u>Boyd</u>, the Court has uniformly held that forcible entries by authorized officials for the purpose of recovering personalty in response to a duly issued writ issued at the instance of one claiming a right to immediate possession offend no prohibition of the Fourth Amendment.

American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); <u>Davis v. United States</u>,

328 U.S. 582 (1945). Lower courts have followed this general rule. United States v. 935 Cases More or Less, Each Containing 6 No. 10 Cans Tomato Puree, 136 F.2d 523 (6th Cir. 1943); United States v. Eighteen Cases Tuna Fish, 5 F.2d 979 (W.D. Va. 1925). Also, see State v. Pope, 4 Wash. 2d 394, 103 P.2d 1089 (1940), which held that a Washington replevin statute providing for forcible entry violated no constitutional Amendment.

In Davis v. United States, <u>supra</u>, federal agents had entered defendant's premises to seize property which the government had the right to reduce to immediate possession. Speaking for the majority, Mr. Justice Douglas wrote, at 328 U.S. 590-591:

"* * * The distinction is between property to which the Government is entitled to possession and property which it is not . The distinction has had important repercussions in the law . For an owner of property who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful." (Emphasis supplied.)

It is respectfully submitted that there is no authority whatsoever for condemning

forcible entry in a replevin context such as is prescribed by the Florida Statutes.

Appellants urge statements of the Court in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), as authority for removing the distinction between civil and criminal cases in the Fourth Amendment context. Appellee Robert L. Shevin respectfully submits that such distinctions are irrelevant to the issues before the Court. What is controlling is not whether forcible entry occurs during investigation of a crime or to replevy goods, but whether under the circumstances in either case, the entry is reasonable.

Appellees insist that assuming such entry were described in facts before the Court, it would not be unreasonable inasmuch as it would have arisen out of an attempt to frustrate execution of the lawful writ and inasmuch as the parties had agreed that repossession would occur. Case law of this and other courts supports Appellees' contention.

Appellant insists that forcible entry in a replevin context would violate Fourth Amendment prohibitions and offers only one case in support, a California decision affording no authority for its holding other than Marbury v. Madison, 5 U.S. (1 Cranch), 137 (1803). See Blair v. Pitchess, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971).

Under this legal posture, and without a record of operative facts to substantiate a Fourth Amendment attack, it would be unusual, indeed, for this Court to undertake reversal of the lower court on this ground. Wyman v. James, 400 U.S. 309 (1971); United States v. Raines, 362 U.S. 17 (1960); United States v. Wurzbach, 280 U.S. 396 (1930); Heald v. District of Columbia, 259 U.S. 114 (1922); Collins v. Texas, 223 U.S. 288 (1912).

CONCLUSION

The Florida replevin statute comports with the requirements of the Due Process Clause of the Fourtheenth Amendment. Furthermore, the entry by the state official for the limited purpose of recovering property did not constitute an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments. Appellant's attempt to have nullified this well-used and time-honored remedy of creditors in commercial and private transactions should be rejected. For reasons and upon authority set out above, the decision of the three-judge court below should be affirmed.

Respectfully submitted,

ROBERT L. SHEVIN Attorney General of Florida DANIEL S. DEARING Chief Trial Counsel

Attorneys for Appellee Shevin

Department of Legal Affairs The Capitol Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief of Appellee Robert L. Shevin has been forwarded, by mail, to:

Bruce S. Rogow, Esq., Attorney for Appellant Fuentes, 622 N. W. 622 Street, Miami, Florida 33150;

C. Michael Abbott, Esq., Attorney for Appellant Fuentes, School of Law, Emory Legal Clinic, Emory University, Atlanta, Georgia;

George Wright, Esq., Attorney for Appellee Firestone Tire and Rubber Company, Mershon, Sawyer, Johnston, Dunwody & Cole, 1600 First National Bank Building, Miami, Florida;

Moore, Welbaum, Zook & Jones, Attorneys for Amicus Chrysler Credit Corporation, 810 Biscayne Building, Miami, Florida 33131;

Shutts & Bowen, Attorneys for Amicus Tenth Floor, First National Bank Building, Miami, Florida 33131;

Dixon, Bradford, Williams, McKay & Kimbrell, Attorneys for Amicus Ford Motor Credit Company, 9th Floor, Dade Federal Building, Miami, Florida 33131;

Jepeway, Gassen & Jepeway, Attorneys for Amicus Universal C.I.T. Corporation and American Industrial Bankers Association, 6th Floor, Dade Federal Building, Miami, Florida 33131;

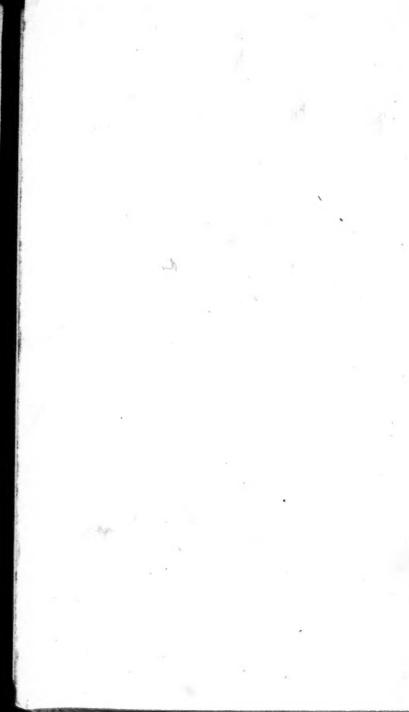
Alan Ashmun, Esq., Attorney for Opposing Amicus National Legal Aid and Defender Association, American Bar Foundation Building, 1155 East 60th Street, Chicago, Illinois 60637;

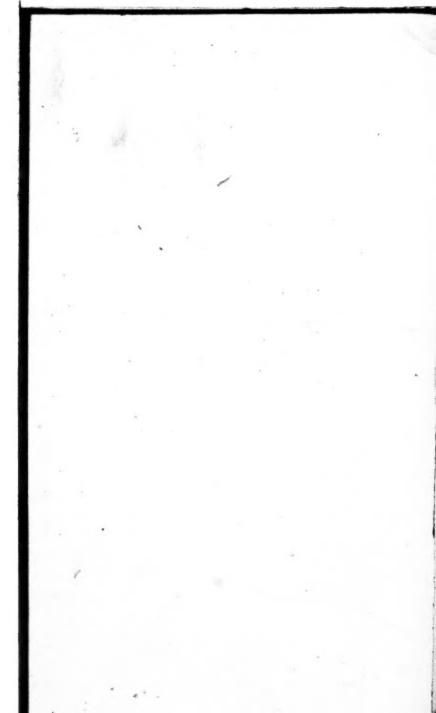
and

Blair C. Shick, Esq., Attorney for Opposing Amicus National Consumer Law Center, Boston College, Brighton, Massachusetts 02135

this ____day of September, 1971.

DANIEL S. DEARING Chief Trial Counsel





NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FUENTES ET AL. v. SHEVIN, ATTORNEY GEN-ERAL OF FLORIDA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 70-5039. Argued November 9, 1971-Decided June 12, 1972*

Appellants, most of whom were purchasers of household goods under conditional sales contracts, challenge the constitutionality of prejudgment replevin provisions of Florida law (in No. 70-5039) and Pennsylvania law (in No. 70-5138). These provisions permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of ex parte application to a court clerk, upon the posting of a bond for double the value of the property to be seized. The sheriff is then required to execute the writ by seizing the property. Under the Florida statute the officer seizing the property must keep it for three days. During that period the defendant may reclaim possession by posting his own security bond for double the property's value, in default of which the property is transferred to the applicant for the writ, pending a final judgment in the underlying repossession action. In Pennsylvania the applicant need not initiate a repossession action or allege (as Florida requires) legal entitlement to the property, it being sufficient that he file an "affidavit of the value of the property"; and to secure a post-seizure hearing the party losing the property through replevin must himself initiate a suit to recover the property. He may also post his own counterbond within three days of the seizure to regain possession. Included in the printed-form sales contracts that appellants signed were provisions for the sellers' repossession of the merchandise on the buyers' default.

^{*}Together with No. 70-5138, Parham et al. v. Cortese et al., on appeal from the United States District Court for the Eastern District of Pennsylvania.

Syllabus

judge District Courts in both cases upheld the constitutionality of the challenged replevin provisions. *Held*:

- The Florida and Pennsylvania replevin provisions are invalid under the Fourteenth Amendment since they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor. Pp. 12-24.
- (a) Procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another, and the minimal deterrent effect of the bond requirement against unfounded applications for a writ constitutes no substitute for a pre-seizure hearing. Pp. 12-15.
- (b) From the standpoint of the application of the Due Process Clause it is immaterial that the deprivation may be temporary and nonfinal during the three-day post-seisure period. Pp. 16-17.
- (c) The possessory interest of appellants, who had made substantial installment payments, was sufficient for them to invoke procedural due process safeguards notwithstanding their lack of full title to the replevied goods. Pp. 18-19.
- (d) The District Courts erred in rejecting appellants' constitutional claim on the ground that the household goods seized were not items of "necessity" and therefore did not require due process protection, as the Fourteenth Amendment imposes no such limitation. Pp. 19-21.
- (e) The broadly drawn provisions here involved serve no such important a state interest as might justify summary seizure. Pp. 22-23.
- 2. The contract provisions for repossession by the seller on the buyer's default did not amount to a waiver of the appellants' procedural due process rights, those provisions neither dispensing with a prior hearing nor indicating the procedure by which repossession was to be achieved. D. H. Overmyer Co. v. Frick Co., 405 U. S. —, distinguished. Pp. 24-27.

No. 70-5039, 317 F. Supp. 954, and No. 70-5138, 326 F. Supp. 127, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which Douglas, BRENNAN, and MARSHALL, JJ., joined. WHITE, J., filed a dissenting opinion, in which Burger, C. J., and BLACKMUN, J., joined. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 2054S, of any typographical er other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 70-5039 AND 70-5138

Margarita Fuentes et al.,
Appellants,
70–5039 v.
Robert L. Shevin, Attorney
General of Florida, et al.

On Appeal from the United States District Court for the Southern District of Florida.

Paul Parham et al.,
Appellants,
70-5138 v.
Americo V. Cortese et al.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June 12, 1972]

Mr. JUSTICE STEWART delivered the opinion of the Court.

We here review the decisions of two three-judge federal district courts that upheld the constitutionality of Florida and Pennsylvania laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin. Both statutes provide for the issuance of writs ordering state agents to seize a person's possessions, simply upon the ex parte application of any other person who claims a right to them and posts a security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing. The question is whether these statutory procedures violate the Fourteenth Amendment's guarantee that no State shall deprive any person of property without due process of law.

I

The appellant in No. 5039, Margarita Fuentes, is a resident of Florida. She purchased a gas stove and service policy from the Firestone Tire and Rubber Company (Firestone) under a conditional sales contract calling for monthly payments over a period of time. A few months later, she purchased a stereophonic phonograph from the same company under the same sort of contract. The total cost of the stove and stereo was about \$500, plus an additional financing charge of over \$100. Under the contracts, Firestone retained title to the merchandise, but Mrs. Fuentes was entitled to possession unless and until she should default on her installment payments.

For more than a year, Mrs. Fuentes made her installment payments. But then, with only about \$200 remaining to be paid, a dispute developed between her and Firestone over the servicing of the stove. Firestone instituted an action in a small claims court for repossession of both the stove and the stereo, claiming that Mrs. Fuentes had refused to make her remaining payments. Simultaneously with the filing of that action and before Mrs. Fuentes had even received a summons to answer its complaint, Firestone obtained a writ of replevin ordering a sheriff to seize the disputed goods at once.

In conformance with Florida procedure, Firestone had only to fill in the blanks on the appropriate form documents and submit them to the clerk of the small claims court. The clerk signed and stamped the documents and issued a writ of replevin. Later the same day, a local deputy sheriff and an agent of Firestone

¹ See p. 5-7 of the text, infra.

went to Mrs. Fuentes' home and seized the stove and stereo.

Shortly thereafter, Mrs. Fuentes instituted the present action in a federal district court, challenging the constitutionality of the Florida prejudgment replevin procedures under the Due Process Clause of the Fourteenth Amendment.3 She sought declaratory and iniunctive relief against continued enforcement of the procedural provisions of the state statutes that authorize prejudgment replevin.

The appellants in No. 5138 filed a very similar action in a federal district court in Pennsylvania, challenging the constitutionality of that State's prejudgment replevin process. Like Mrs. Fuentes, they had had possessions seized under writs of replevin. Three of the appellants had purchased personal property—a bed, a table, and other household goods-under installment sales contracts like the one signed by Mrs. Fuentes; and the sellers of the property had obtained and executed summary writs of replevin, claiming that the appellants had fallen behind in their installment payments. The experience of the fourth appellant, Rosa Washington, had been more bizarre. She had been divorced from a local deputy sheriff and was engaged in a dispute with him over the custody of their son. Her former hus-

² Both Mrs. Fuentes and the appellants in No. 5138 also challenged the prejudgment replevin procedures under the Fourth Amendment, made applicable to the States by the Fourteenth. We do not, however, reach that issue. See n. 32, infra.

³ Neither Mrs. Fuentes nor the appellants in No. 5138 sought an injunction against any pending or future court proceedings as such. Compare Younger v. Harris, 401 U. S. 37. Rather, they challenged only the summary extra-judicial process of prejudgment seizure of property to which they had already been subjected. They invoked the jurisdiction of the federal district courts under 42 U.S.C. § 1983 and 28 U. S. C. § 1343 (3).

I

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band, being familiar with the routine forms used in the replevin process, had obtained a writ that ordered the seizure of the boy's clothes, furniture, and toys.

In both No. 5039 and No. 5138, three-judge district courts were convened to consider the appellants' challenges to the constitutional validity of the Florida and Pennsylvania statutes. The courts in both cases upheld the constitutionality of the statutes. Fuentes v. Faircloth, 317 F. Supp. 954 (SD Fla); Epps v. Cortese, 326 F. Supp. 127 (ED Pa.). We noted probable jurisdiction of both appeals. 401 U. S. 906; 402 U. S. 994

⁴ Unlike Mrs. Fuentes in No. 5039, none of the appellants in No. 5138 was ever sued in any court by the party who initiated seizure of the property. See pp. 9-10 of the text, infra.

Since the announcement of this Court's decision in Sniadach v. Family Finance Corp., 395 U.S. 337, summary prejudgment remedies have come under constitutional challenge throughout the country. The summary deprivation of property under statutes very similar to the Florida and Pennsylvania statutes at issue here has been held unconstitutional by at least two courts. Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (NDNY); Blair v. Pitchess, 486 P. 2d 1242 (Cal. Sup. Ct.). But see Brunswick Corp. v. J. & P., Inc., 424 F. 2d 100 (CA10); Wheeler v. Adams Co., 322 F. Supp. 645 (Md.); Almor Furniture & Appliances, Inc. v. MacMillan, 280 A. 2d 862 (NJ Sup. Ct.). Applying Sniadach to other closely related forms of summary prejudgment remedies, some courts have construed that decision as setting forth general principles of procedural due process and have struck down such remedies. E. g., Adams v. Egley, 40 U. S. L. W. 2546 (SD Cal., Feb. 11, 1972); Collins v. The Viceroy Hotel Corp., 40 U. S. L. W. 2537 (ND Ill., Feb. 2, 1972); Santiago v. McElroy, 319 F. Supp. 284 (ED Pa.); Klim v. Jones, 315 F. Supp. 109 (ND Cal.); Randone v. Appellate Dept., 488 P. 2d 13 (Cal. Sup. Ct.); Larson v. Fetherston, 44 Wis. 2d 712; Jones Press Inc. v. Motor Travel Services Inc., 286 Minn. 205. See Lebowitz v. Forbes Leasing & Finance Corp., 326 F. Supp. 1335, 1341-1348 (ED Pa.). Other courts, however, have construed Sniadach as closely confined to its own facts and have upheld such summary prejudgment remedies. E. g., Reeves v. Motor Contract Co., 324 F. Supp. 1011 (ND Ga.); Black Watch

II

Under the Florida statute challenged here, "[a]ny person whose goods or chattels are wrongfully detained by any other person . . . may have a writ of replevin

Farms v. Dick, 323 F. Supp. 100 (Conn.); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (Hawaii); Young v. Ridley, 309 F. Supp. 1308 (DC); Termplan, Inc. v. Superior Court, 105 Aris. 270; 300 West 154th Street Realty Co. v. Department of Buildings, 26 N. Y. 2d 538.

*The relevant Florida statutory provisions are the following:

"Florida Statutes, § 78.01

"RIGHT TO REPLEVIN.—Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond. . . .

"Florida Statutes, § 78.07

"BOND; REQUISITES.—Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action.

"Florida Statutes, \$ 78.08

"WRIT; FORM; RETURN.—The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.

"Florida Statutes, § 78.10

"WRIT, EXECUTION ON PROPERTY IN BUILDINGS, ETC.—In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof

to recover them" Fla. Stats. § 78.01. There is no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, "wrongfully detained." Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is "lawfully entitled to the possession" of the property, and that he file a security bond

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On the sole basis of the complaint and bond, a writ is issued "command[ing] the officer to whom it may be directed to replevy the goods and chattels in the possession of the defendant . . . and to summon the defendant to answer the complaint." Fla. Stats. § 78.08.

and if it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.

[&]quot;Florida Statutes, § 78.13

[&]quot;WRIT; DISPOSITION OF PROPERTY LEVIED ON.—The officer executing the writ shall deliver the property to plaintiff after the lapse of three days from the time the property was taken unless within the three days defendant gives bond with surety to be approved by the officer in double the value of the property as appraised by the officer, conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant."

If the goods are "in any dwelling house or building or enclosure," the officer is required to demand their delivery; but, if they are not delivered, "he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ . . . " Fla. Stats. § 78.10.

Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. After the property has been seized, he will eventually have an opportunity for a hearing, as the defendant in the trial of the court action for repossession, which the plaintiff is required to pursue. And he is also not wholly without recourse in the meantime. For under the Florida statute, the officer who seizes the property must keep it for three days, and during that period the defendant may reclaim possession of the property by posting his own security bond in double its value. But if he does not post such a bond, the property is transferred to the party who sought the writ, pending a final judgment in the underlying action for repossession. Fla. Stats. § 78.13.

The Pennsylvania law differs, though not in its essential nature, from that of Florida. As in Florida,

[†]The basic Pennsylvania statutory provision regarding the issuance of writs or replevin is the following:

[&]quot;12 P. S. § 1821. Writs of replevin authorized

[&]quot;It shall and may be lawful for the justices of each county in this province to grant writs of replevin, in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law."

The procedural prerequisites to issuance of a prejudgment writ are,

a private party may obtain a prejudgment writ of replevin through a summary process of ex parte application, although a prothonotary rather than a court clerk

however, set forth in the Pennsylvania Rules of Civil Procedure. The relevant rules are the following:

"Rule 1073. Commencement of Action

"(a) An action of replevin with bond shall be commenced by filing with the prothonotary a praccipe for a writ of replevin with bond, together with

"(1) the plaintiff's affidavit of the value of the property to be

replevied, and

"(2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.

"(b) An action of replevin without bond shall be commenced by

filing with the prothonotary

"(1) a praecipe for a writ of replevin without bond or

"(2) a complaint.

"If the action is commenced without bond, the sheriff shall not replevy the property but at any time before the entry of judgment the plaintiff, upon filing the affidavit and bond prescribed by subdivision (a) of this rule, may obtain a writ of replevin with bond, issued in the original action, and have the sheriff replevy the property. "Rule 1076. Counterbond

"A counterbond may be filed with the prothonotary by a defendant or intervenor claiming the right to the possession of the property, except a party claiming only a lien thereon, within seventy-two (72) hours after the property has been replevied, or within seventy-two (72) hours after service upon the defendant when the taking of possession of the property by the sheriff has been waived by the plaintiff as provided by Rule 1077 (a), or within such extension of time as may be granted by the court upon cause shown.

"(b) The counterbond shall be in the same amount as the original bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the party filing it fails to maintain his right to possession of the property he shall pay to the party entitled thereto the value of the property, and all legal costs, fees and damages sustained by reason issues the writ. As in Florida, the party seeking the writ may simply post with his application a bond in double the value of the property to be seized. Pa. Rule Civ. Proc. 1073 (a). There is no opportunity for a prior hearing and no prior notice to the other party. On this basis, a sheriff is required to execute the writ by seizing the specified property. Unlike the Florida statute, however, the Pennsylvania law does not require that there ever be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property. The party seeking the writ is not obliged to initiate a court action for repossession. Indeed, he need not even formally allege that he is lawfully

of the delivery of the replevied property of the party filing the counterbond.

[&]quot;Rule 1077. Disposition of Replevied Property. Sheriff's Return

[&]quot;(a) When a writ of replevin with bond is issued, the sheriff shall leave the property during the time allowed for the filing of a counterbond in the possession of the defendant or of any other person if the plaintiff so authorizes him in writing.

[&]quot;(b) Property taken into possession by the sheriff shall be held by him until the expiration of the time for filing a counterbond. If the property is not ordered to be impounded and if no counterbond is filed, the sheriff shall deliver the property to the plaintiff.

[&]quot;(c) If the property is not ordered to be impounded and the person in possession files a counterbond, the property shall be delivered to him, but if he does not file a counterbond, the property shall be delivered to the party first filing a counterbond.

[&]quot;(d) When perishable property is replevied the court may make such order relating to its sale or disposition as shall be proper.

[&]quot;(e) The return of the sheriff to the writ of replevin with bond shall state the disposition made by him of the property and the name and address of any person found in possession of the property."

⁸ Pa. Rule Civ. Proc. 1073 (b) does establish a procedure whereby an applicant may obtain a writ by filing a complaint, initiating a later court action. See n. 7, supra. In the case of every appellant in No. 70–5138, the applicant proceeded under Rule 1073 (a) rather than 1073 (b), seizing property under no more than a security bond and initiating no court action.

entitled to the property. The most that is required is that he file an "affidavit of the value of the property to be replevied." Pa. Rule Civ. Proc. 1073 (a). If the party who loses property through replevin seizure is to get even a post-seizure hearing, he must initiate a law-suit himself. He may also, as under Florida law, post his own counterbond within three days after the seizure to regain possession. Pa. Rule Civ. Proc. 1076.

III

Although these prejudgment replevin statutes are descended from the common law replevin action of six centuries ago, they bear very little resemblance to it. Replevin at common law was an action for the return of specific goods wrongfully taken or "distrained" Typically, it was used after a landlord (the "distrainer") had seized possessions from a tenant (the "distrainee") to satisfy a debt allegedly owed. If the tenant then instituted a replevin action and posted security, the landlord could be ordered to return the property at once, pending a final judgment in the underlying action. However, this prejudgment replevin of goods at com-

⁹ Pa. Rule Civ. Proc. 1037 (a) establishes the procedure for initiating such a suit:

[&]quot;If an action is not commenced by a complaint, [under Rule 1073 (b)] the prothonotary, upon praccipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praccipe of the defendant, shall enter a judgment of non pros."

None of the appellants in No. 70-5138 attempted to initiate the process to require the filing of a post-seizure complaint under Rule 1037 (a).

¹⁰ See Plucknett, A Concise History of the Common Law 367-369 (1956); 3 Holdsworth, History of English Law 284-285 (1927); 2 Pollock & Maitland, History of English Law 577 (1909); Cobbey, Replevin 19-29 (1890).

mon law did not follow from an entirely ex parte process of pleading by the distrainee. For "[t]he distrainor could always stop the action of replevin by claiming to be the owner of the goods; and as this claim was often made merely to delay the proceedings, the writ de proprietate probanda was devised early in the fourteenth century which enabled the sheriff to determine summarily the question of ownership. If the question of ownership was determined against the distrainor the goods were delivered back to the distrainee [pending final judgment]." 3 Holdsworth, History of English Law 284 (1927).

Prejudgment replevin statutes like those of Florida and Pennsylvania are derived from this ancient possessory action in that they authorize the seizure of property before a final judgment. But the similarity ends there. As in the present cases, such statutes are most commonly used by creditors to seize goods allegedly wrongfully detained-not wrongfully taken-by debtors. At common law, if a creditor wished to invoke state power to recover goods wrongfully detained, he had to proceed through the action of debt or detinue.11 These actions, however, did not provide for a return of property before final judgment.12 And, more importantly, on the occasions when the common law did allow prejudgment seizure by state power, it provided some kind of notice and opportunity to be heard to the party then in possession of the property, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.

¹¹ See Plucknett, supra, n. 10, at 362-365; Pollack & Maitland, supra, n. 10, at 173-175, 203-211.

¹² The creditor could, of course, proceed without the use of state power, through self-help, by "distraining" the property before a judgment. See n. 10, supra.

IV

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified." Baldwin v. Hale, 68 U. S. 223. See Windsor v. McVeigh, 93 U. S. 274; Hovey v. Elliott, 167 U. S. 409; Grannis v. Ordean, 234 U. S. 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U. S. 545, 552.

The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings "at a meaningful time." The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor Pennsylvania statute provides for notice or an opportunity to be heard before the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of

and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See Lynch v. Household Finance Corp., - U. S. - . -

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decisionmaking that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 170-172 (Frankfurter, J., concurring).

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

Stanley v. Illinois, - U. S. -, -.

This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case." Mullane v. Central Hanover Tr. Co. 339 U. S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]." Boddie v. Connecticut, 401 U. S. 371, 378, the Court has traditionally insisted that. whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. E. g., Bell v. Burson, 402 U. S. 535, 542; Wisconsin v. Constantineau, 400 U. S. 433, 437; Goldberg v. Kelly, 397 U. S. 254; Armstrong v. Manzo, supra, at 551: Mullane v. Central Hanover Tr. Co., supra, at 313: Opp Cotton Mills v. Administrator, 312 U. S. 126, 152-153; United States v. Illinois Cent. R. Co., 291 U. S. 457, 463; Londoner v. City & County of Denver, 210 U. S. 373, 385-386. See In re Ruffalo, 390 U. S. 544. 550-551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, supra, at 378-379 (emphasis in original).

The Florida and Pennsylvania prejudgment replevin statutes fly in the face of this principle. To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those require-

ments are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights.13 Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, selfinterested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

V

The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within

¹³ They may not even test that much. For if an applicant for the writ knows that he is dealing with an uneducated, uninformed consumer with little access to legal help and little familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property—however unwarranted—may go unchallenged, and the applicant may feel that he can act with impunity.

the Fourteenth Amendment's protection. In the present cases, the Florida and Pennsylvania statutes were applied to replevy chattels in the appellants' possession. The replevin was not cast as a final judgment; most, if not all, of the appellants lacked full title to the chattels; and their claim even to continued possession was a matter in dispute. Moreover, the chattels at stake were nothing more than an assortment of household goods. Nonetheless, it is clear that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment.

A

A deprivation of a person's possessions under a prejudgment writ of replevin, at least in theory, may be only temporary. The Florida and Pennsylvania statutes do not require a person to wait until a post-seizure hearing and final judgment to recover what has been replevied. Within three days after the seizure, the statutes allow him to recover the goods if he, in return, surrenders other property—a payment necessary to secure a bond in double the value of the goods seized from him. But it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment. Sniadach v. Family Finance Corp., supra; Bell v. Burson, supra. Both Snia-

²⁴ The appellants argue that this opportunity for quick recovery exists only in theory. They allege that very few people in their position are able to obtain a recovery bond, even if they know of the possibility. Appellant Fuentes says that in her case she was never told that she could recover the stove and stereo and that the deputy sheriff seising them gave them at once to the Firestone agent, rather than holding them for three days. She further asserts that of 442 cases of prejudgment replevin in small claims courts in Dade County, Florida, in 1969, there was not one case in which the defendant took advantage of the recovery provision.

dach and Bell involved takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them.18 Yet the Court firmly held that these were deprivations of property that must be preceded by a fair hearing.

The present cases are no different. When officials of Florida or Pennsylvania seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge and the time needed to take advantage of the recovery provision. The Fourteenth Amendment draws no bright lines around three-day. 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

¹⁵ Bell v. Burson, supra, at 536. Although not mentioned in the Sniadach opinion, there clearly was a quick recovery provision in the Wisconsin prejudgment garnishment statute at issue. Wis. Stat. Ann. § 267.21 (1) (Supp. 1970-1971). Family Finance Corp. v. Sniadach, 37 Wis. 2d 163, 173-174. Mr. Justice Harlan adverted to the recovery provision in his concurring opinion. 395 U.S., at 343.

These sorts of provisions for recovery of property by posting security are, of course, entirely different from the security requirement upheld in Lindsey v. Normet, - U. S. -, -. There, the Court upheld a requirement that a tenant wanting a continuance of an eviction hearing must post security for accruing rent during the continuance. The tenant did not have to post security in order to remain in possession before a hearing; rather, he had to post security only in order to obtain a continuance of the hearing. Moreover, the security requirement in Lindsey was not a recovery provision. For the tenant was not deprived of his possessory interest even for one day without opportunity for a hearing.

B

The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest," Boddie v. Connecticut, supra, at 379, including statutory entitlements. See Bell v. Burson, supra, at 539; Goldberg v. Kelly, supra, at 262.

The appellants were deprived of such an interest in the replevied goods—the interest in continued possession and use of the goods. See Sniadach v. Family Finance Corp., supra, at 342 (Harlan, J., concurring). They had acquired this interest under the conditional sales contracts that entitled them to possession and use of the chattels before transfer of title. In exchange for immediate possession, the appellants had agreed to pay a major financing charge beyond the basic price of the merchandise. Moreover, by the time the goods were summarily repossessed, they had made substantial installment payments. Clearly, their possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause.

Their ultimate right to continued possession was, of course, in dispute. If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be

¹⁶ The possessory interest of Rosa Washington, an appellant in No. 5138, in her son's clothes, furniture, and toys was no less sufficient to invoke due process safeguards. Her interest was not protected by contract. Rather, it was protected by ordinary property law, there being a dispute between her and her estranged husband over which of them had a legal right not only to custody of the child but also to possession of the chattels.

entitled to repossession. But even assuming that the appellants had fallen behind in ther installment payments. and that they had no other valid defenses, 17 that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer Works, 237 U. S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.18

C

Neverthless, the district courts rejected the appellants' constitutional claim on the ground that the goods seized from them—a stove, a stereo, a table, a bed, and so forth—were not deserving of due process protection, since they were not absolute necessities of life. The courts based this holding on a very narrow reading of Sniadach v. Family Finance Corp., supra, and Goldberg v. Kelly, supra, in which this Court held that

¹⁷ Mrs. Exentes argues that Florida law allows her to defend on the ground that Firestone breached its obligations under the sales contract by failing to repair serious defects in the stove it sold her. We need not consider this issue here. It is enough that the right to continued possession of the goods was open to *some* dispute at a hearing since the sellers of the goods had to show, at the least, that the appellants had defaulted in their payments.

¹⁸ The issues decisive of the ultimate right to continued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality or scheduling of a prior hearing. See Lindsey v. Normet, — U. S. —, —. But it certainly cannot undercut the right to a prior hearing of some kind.

the Constitution requires a hearing before prejudgment wage garnishment and before the termination of certain welfare benefits. They reasoned that *Sniadach* and *Goldberg*, as a matter of constitutional principle, established no more than that a prior hearing is required with respect to the deprivation of such basically "necessary" items as wages and welfare benefits.

This reading of Sniadach and Goldberg reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.10 E. g., Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153; United States v. Illinois Cent. R. Co., 291 U. S. 457, 463: Southern Ry. Co. v. Virginia, 290 U. S. 190; Londoner v. City & County of Denver, 210 U. S. 373: Central of Georgia v. Wright, 307 U. S. 127; Security Trust Co. v. Lexington, 203 U. S. 323; Hibben v. Smith, 191 U. S. 310; Glidden v. Harrington, 189 U. S. 255. In none of those cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While Sniadach and Goldberg emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.20

¹⁹ The Supreme Court of California recently put the matter accurately: "Sniadach does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of past procedural due process decisions of the United States Supreme Court." Randone v. Appellate Department, 488 P. 2d 13, 22.

²⁰ Sniadach v. Family Finance Corp., supra, at 340; Goldberg v. Kelly, supra, at 264. Of course, the primary issue in Goldberg was

Nor did they carve out a rule of "necessity" for the sort of nonfinal deprivations of property that they involved. That was made clear in *Bell v. Burson, supra*, holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of "necessity" exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an "important interest," 402 U. S., at 539, entitled to the protection of procedural due process of law.

The household goods, for which the appellants contracted and paid substantial sums, are deserving of similar protection. While a driver's license, for example, "may become [indirectly] essential in the pursuit of a livelihood," ibid., a stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives. It is, after all, such consumer goods that people work and earn a livelihood in order to acquire.

No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally. And, under our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and

the form of hearing demanded by due process before termination of welfare benefits; the importance of welfare was directly relevant to that question.

protect only the ones that, by its own lights, are "necessary." 21

VI

There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, supra, at 379. These situations, however, must be truly unusual.²² Only in a few limited situations has this Court allowed outright seizure ²³ without

²¹ The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. See, e. g., Boddie v. Connecticut, 401 U. S. 371, 378, and cases cited therein. But some form of notice and hearing—formal or informal—is required before deprivation of a property interest that "cannot be characterized as de minimus." Sniadach v. Family Finance Corp., supra, at 342 (Harlan, J., concurring).

²² A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell v. Burson*, supra, at 540-541; Goldberg v. Kelly, supra, at 261. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials, and perhaps more, than mediocre ones." Stanley v. Illinois, — U. S. —, —.

²³ Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. See, e. g., Sniadach v. Family Finance Corp., supra. In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a

opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States,²⁴ to meet the needs of a national war effort,²⁵ to protect

bank failure. Coffin Brothers & Co. v. Bennett, 277 U. S. 29. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. Ownbey v. Morgan, 256 U. S. 94. It is much less clear what interests were involved in the third case, decided with an unexplicated per curiam opinion simply citing Coffin Brothers and Ownbey. McKay v. McInnes, 279 U. S. 820. As far as essential procedural due process doctrine goes, McKay cannot stand for any more than was established in the Coffin Brothers and Ownbey cases on which it relied completely. See Sniadach v. Family Finance Corp., supra, at 340; id., at 344 (Harlan, J., concurring).

In cases involving deprivation of other interests, such as government employment, the Court similarly has required an unusually important governmental need to outweigh the right to a prior hearing. See, e. g., Cafeteria Workers v. McElroy, 367 U. S. 886, 895-896.

Seizure under a search warrant is quite a different matter, see n. 30, infra.

²⁴ Phillips v. Commissioner, 283 U. S. 589. The Court stated that "[d]elay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." Id., at 597 (emphasis supplied). The Court, then relied on "the need of the government promptly to secure its revenues." Id., at 596.

²⁵ Central Union Trust Co. v. Garvan, 254 U. S. 554, 566; Stochr v. Wallace, 255 U. S. 239, 245; United States v. Pfitsch, 256 U. S. 547, 553.

against the economic disaster of a bank failure, 26 and to protect the public from misbranded drugs 27 and contaminated food.28

The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake.²⁹ The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health.

In any event, the aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an opportunity to be heard. Since the issues and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forgo their opportunity, sensing the futility of the exercise in the particular case. And, of course, no hearing need be held unless the defendant, having received notice of his opportunity takes advantage of it.

²⁴ Fahey v. Mallonee, 332 U. S. 245.

²⁷ Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594.

²⁸ North American Storage Co. v. Chicago, 211 U.S. 306.

per by allowing repossession without an opportunity for a prior hearing, the Florida and Pennsylvania statutes may be intended specifically to reduce the costs for the private party seeking to seize goods in another party's possession. Even if the private gain at stake in repossession actions were equal to the great public interests recognized in this Court's past decisions, see nn. 24–28, supra, the Court has made clear that the avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right. See n. 22, supra. The appellees argue that the cost of holding hearings may be especially onerous in the context of the creditor-debtor relationship. But the Court's holding in Sniadach v. Family Finance Corp., supra, undisputably demonstrates that ordinary hearing costs are no more able to override due process rights in the creditor-debtor context than in other contexts.

Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not "narrowly drawn to meet such unusual condition." Sniadach v. Family Finance Corp., supra, at 339. And no such unusual situation is presented by the facts of these cases.

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.³⁰

³⁰ The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need-e. q., the apprehension and conviction of criminals-rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued. But cf. A Quantity of Books v. Kansas, 378 U. S. 205.

VII

Finally, we must consider the contention that the appellants who signed conditional sales contracts thereby waived their basic procedural due process rights. The contract signed by Mrs. Fuentes provided that "in the event of default of any payment or payments, Seller at its option may take back the merchandise" The contracts signed by the Pennsylvania appellants similarly provided that the seller "may retake" or "repossess" the merchandise in the event of a "default in any payment." These terms were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning.

In D. H. Overmyer Co. v. Frick Co., 405 U. S. 174, the Court recently outlined the considerations relevant to determination of a contractual waiver of due process rights. Applying the standards governing waiver of constitutional rights in a criminal proceeding ⁵¹—although not holding that such standards must necessarily apply—the Court held that, on the particular facts of that case, the contractual waiver of due process rights was "voluntarily, intelligently and knowingly" made. Id., at 187. The contract in Overmyer was negotiated between two corporations; the waiver provision was specifically bargained for and drafted by their lawyers in the process of these negotiations. As the Court noted, it was "not a case of unequal bargaining power or overreaching. The Overmyer-Frick agree-

²¹ See Brady v. United States, 397 U. S. 742, 748; Johnson v. Zerbst, 304 U. S. 458, 464. In the civil area, the Court has said that "we do not presume acquiescence in the loss of fundamental rights," Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U. S. 292, 307. Indeed, in the civil no less than the criminal area, "courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U. S. 389, 393.

ment, from the start, was not a contract of adhesion." Id., at 186. Both parties were "aware of the significance" of the waiver provision. Ibid.

The facts of the present cases are a far cry from those of Overmyer. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

The Court in Overmyer observed that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue." Id., at 188. Yet, as in Overmyer, there is no need in the present cases to canvass those consequences fully. For a waiver of constitutional rights in any context must, at the very least, be clear. The contractual language relied upon must, on its face, amount to a waiver.

The conditional sales contracts here simply provided that upon a default the seller "may take back," "may retake" or "may repossess" merchandise. The contracts included nothing about the waiver of a prior hearing. They did not indicate how or through what process—a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing—the seller could take back the goods. Rather, the purported waiver provisions here are no more than a statement of the seller's right to repossession upon occurrence of certain events. The appellees do not suggest that these provisions waived the appellants' right to a full post-seizure hearing to determine whether those

events had, in fact, occurred and to consider any other available defenses. By the same token, the language of the purported waiver provisions did not waive the appellants' constitutional right to a preseizure hearing of some kind.

VIII

We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation-not adjudication." Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. "[D]ue process is afforded only

³² We do not reach the appellant's argument with the Florida and Pennsylvania statutory procedures violate the Fourth Amendment, made applicable to the States by the Fourteenth. See n. 2, supra. For once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated. There is no need for us to decide that question at this point.

³³ Leeway remains to develop a form of hearing that will minimise unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute.

by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property"

Sniadach v. Family Finance Corp., supra, at 343 (Harlan, J., concurring). See Bell v. Burson, supra, at 540; Goldberg v. Kelly, supra, at 267.

For the foregoing reasons, the judgments of the district courts are vacated and these cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST did not participate in the consideration or decision of these



SUPREME COURT OF THE UNITED STATES

Nos. 70-5039 AND 70-5138

Margarita Fuentes et al.,
Appellants,
70–5039 v.
Robert L. Shevin, Attorney
General of Florida, et al.

On Appeal from the United States District Court for the Southern District of Florida.

Paul Parham et al.,
Appellants,
70-5138 v.
Americo V. Cortese et al.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June 12, 1972]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

Because the Court's opinion and judgment improvidently, in my view, call into question important aspects of the statutes of almost all the States governing secured transactions and the procedure for repossessing personal property, I must dissent for the reasons which follow.

First: It is my view that when the federal actions were filed in these cases and the respective District Courts proceeded to judgment there were state court proceedings in progress. It seems apparent to me that the judgments should be vacated and the District Courts instructed to reconsider these cases in the light of the principles announced in Younger v. Harris, 401 U. S. 37 (1971); Samuels v. Mackell, id., at 66; Boyl v. Landry, id., at 77; and Perez v. Ledesma, id., at 82.

In No. 70-5039, the Florida statutes provide for the commencement of an action of replevin, with bond, by serving a writ summoning the defendant to answer the complaint. Thereupon the sheriff may seize the property, subject to repossession by defendant within three

days upon filing of a counterbond, failing which the property is delivered to plaintiff to await final judgment in the replevin action. Fla. Stat. § 78.01 et seq. (1969). This procedure was attacked in a complaint filed by petitioner Fuentes in the federal court, alleging that an affidavit in replevin had been filed by Firestone Tire & Rubber Company in the Small Claims Court of Dade County, that a writ of replevin had been issued pursuant thereto and duly served, together with the affidavit and complaint, and that a trial date had been set in the Small Claims Court. Firestone's answer admitted that the replevin action was pending in the Small Claims Court and asserted that Mrs. Fuentes, plaintiff in the federal court and appellant here, had not denied her default or alleged that she had the right to possession of the property. Clearly, state court proceedings were pending, no bad faith or harassment was alleged and no irreparable injury appeared that could not have been averted by raising constitutional objections in the pending state court proceeding. In this posture, it would appear that the case should be reconsidered under Younger v. Harris and companion cases, which were announced after the District Court's judgment.

In No. 70-5138, Pennsylvania Rule of Civil Procedure 1073 expressly provides that an "action of replevin with bond shall be commenced by filing with the prothonotary a precipe for writ of replevin with bond ..." When the writ issues and is served, the plaintiff has three days to file counterbond and should he care to have a hearing he may file his own praecipe, in which event the plaintiff must proceed further in the action by filing and serving his complaint.

In the cases before us, actions in replevin were commenced in accordance with the rules, and appellee Sears, Roebuck and Company urged in the District Court that plaintiffs had "adequate remedies at law which they could pursue in state court proceedings which are still pending in accordance with the statutes and rules of Peansylvania." App. 60. Under Younger v. Harris and companion cases, the District Court's judgment should be vacated and the case reconsidered.

Second: It goes without saying that in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid, the seller early in the transaction often having more at stake than the buyer. Neither is it disputed that the buyer's right to possession is conditioned upon his making the stipulated payments and that upon default the seller is entitled to possession. Finally, there is no question in these cases that if default is disputed by the buyer he has the opportunity for a full hearing and that if he prevails he may have the property or its full value as damages.

The narrow issue, as the Court notes, is whether it comports with due process to permit the seller, pending final judgment, to take possession of the property through a writ of replevin served by the sheriff without affording the buyer opportunity to insist that the seller establish at a hearing that there is reasonable hasis for his claim of default. The interests of the buyer and seller are obviously antagonistic during this interim period: the buyer wants the use of the property pending final judgment: the seller's interest is to prevent further use and deterioration in his security. By the Florida and Pennsylvania law the property is for all intents and purposes placed in custody and immobilized during this time. The buyer loses use of the property temporarily but is protected against loss: the seller is protected against deterioration of the property but must undertake by bond to make the buyer whole in the event the latter prevails.

In considering whether this resolution of conflicting interests is unconstitutional, much depends on one's perceptions of the practical considerations involved. The Court holds it constitutionally essential to afford opportunity for a probable cause hearing prior to repossession, Its stated purpose is "to prevent unfair and mistaken deprivations of the property." But in these typical situations, the buyer-debtor has either defaulted or he has not. If there is a default, it would seem not only "fair," but essential, that the creditor be allowed to repossess; and I cannot say that the likelihood of a mistaken claim of default is sufficiently real or recurring to justify a broad constitutional requirement that a creditor do more than the typical state law requires and permits him to do. Sellers are normally in the business of selling and collecting the price for their merchandise. I could be quite wrong, but it would not seem in the creditor's interest for a default occasioning repossession to occur; as a practical matter it would much better serve his interests if the transaction goes forward and is completed as planned. Dollar and cents considerations weigh heavily against false claims of default as well as against precipitate action that would allow no opportunity for mistakes to surface and be corrected.* Nor does it seem to me that creditors would

^{*}Appellants Paul and Ellen Parham admitted in their complaints that they were delinquent in their payments. They stipulated to this effect as well as to receipt of notices of delinquency prior to institution of the replevin action, and the District Court so found. Appellant Epps alleged in his complaint that he was not in default. The defendant, Government Employees Exchange Corp., answered that Epps was in default in the amount of \$311.25 as of August 9, 1970, that the entire sum due had been demanded in accordance with the relevant documents and that Epps had failed and refused to pay that sum. The District Court did not resolve this factual dispute. It did find that Epps earned in excess of \$10,000 per year and that the agreements Epps and Parham entered

lightly undertake the expense of instituting replevin actions and putting up bonds.

The Court relies on prior cases, particularly Goldberg v. Kelly, 397 U. S. 254 (1970); Bell v. Burson, 402 U. S. 535 (1971) and Stanley v. Illinois, - U. S. - (1972). But these cases provide no automatic test for determining whether and when due process of law requires adversary proceedings. Indeed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . [W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). See also Stanley v. Illinois, - U. S. -, - (1972); Goldberg v. Kelly, 397 U. S. 254, 263 (1970). Viewing the issue before us in this light, I would not construe the Due Process Clause to require the creditors to do more than they have done in these cases to secure possession pending final hearing. Certainly, I would not ig-

into complied with the provisions of Pennsylvania's Uniform Commercial Code and its Services and Installment Sales Act.

As for appellant Rosabelle Andrews Washington, the District Court, based on the allegations of her complaint, entered a temporary restraining order requiring that the property seized from her be returned forthwith. At a subsequent hearing the order was dissolved, the court finding "that the representations upon which the temporary restraining order of September 18, 1970, issued were incorrect, both as to allegations contained in the complaint and representations made by counsel." (App. 29.)

It was stipulated between appellant Fuentes and defendants in the District Court that Mrs. Fuentes was in default at the time the replevin action was filed and that notices to this effect were sent to her over several months prior to institution of the suit. (App. 25–26.)

nore, as the Court does, the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest. Surely under the Court's own definition, the creditor has a "property" interest as deserving of protection as that of the debtor. At least the debtor, who is very likely uninterested in a speedy resolution that could terminate his use of the property, should be required to make those payments, into court or otherwise, upon which his right to possession is conditioned. Cf. Lindsay v. Normet, — U. S. — (1972).

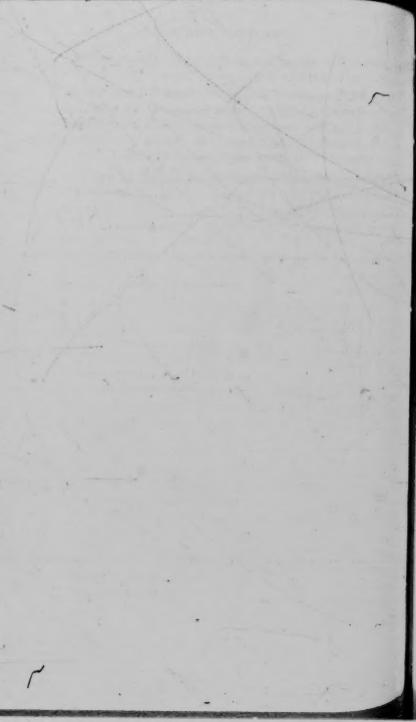
Third: The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all. Alternatively, they need only give a few days' notice of a hearing, take possession if hearing is waived or if there is default; and if hearing is necessary merely establish probable cause for asserting that default has occurred. It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide. On the contrary, the availability of credit may well be diminished or, in any event, the expense of securing it increased.

None of this seems worth the candle to me. The procedure which the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. The Uniform Commercial Code, which now so pervasively

governs the subject matter with which it deals, provides in Art. 9, § 9-503, that:

"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of peace or may proceed by action"

Recent studies have suggested no changes in Art. 9 in this respect. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report, § 9-503 (April 25, 1971). I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.



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Supreme Constant, JR., GLERK of the United States

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OCTOBER TERM, 1970

No. 70-5039

MARGARITA FUENTES.

Appellant,

28.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and THE FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

PETITION FOR REHEARING OF APPELLEE, THE FIRESTONE TIRE AND RUBBER COMPANY

GEORGE W. WRIGHT, JR. KARL B. BLOCK, JR. 1600 First National Bank Building Miami, Florida Counsel for Appellee, The Firestone-Tire and Rubber Company

MERSHON, SAWYER, JOHNSTON DUNWODY & COLE 1600 First National Bank Building Miami, Florida Of Counsel for Appellee, The Firestone Tire and Rubber Company



Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5039

MARGARITA FUENTES,

Appellant,

108

ROBERT L. SHEVIN, Attorney General for the State of Florida, and THE FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

PETITION FOR REHEARING OF APPELLEE, THE FIRESTONE TIRE AND RUBBER COMPANY

Appellee, The Firestone Tire and Rubber Company (hereafter, "Firestone"), pursuant to the provisions of Rule 58, Supreme Court Rules, respectfully petitions for rehearing of the decision herein rendered on June 12, 1972. (All emphasis herein is supplied, unless otherwise noted.) Firestone petitions for rehearing before the full complement of nine Justices of this Court. Firestone has a number of

grounds for rehearing, but perhaps the most important arises from the fact that this case and its companion were argued to and thus decided by seven members of the Court.

This Court unquestionably has the power to strike down, by decision of a single case, the legislative enactments of Congress and all the states. Certainly that is the effect of this case, since virtually all states and the District of Columbia have (or had) pre-judgment replevin procedures.² If 49 legislatures are to be overruled, however, it seems only proper that the judgment be that of the majority of nine Justices of this Court. The fortuitous, or unfortuitous, circumstance of argument calendaring should not determine whether a long-standing and widespread business practice stands or falls, and centuries of statute law abrogated.

Four members of the Court to whom the case was submitted hold the opinion that the Florida pre-judgment replevin procedure denies procedural due process; but three members of the Court are of contrary opinion. If the two non-participating Justices were to agree with the present minority, the law of the land and the meaning of our Constitution would be different in a deeply significant way. Petition is therefore made for resubmission of this cause to the nine Justices who are constitutionally directed, though not required, to decide issues like those presented here. The pre-judgment replevin procedure has been in

¹Parham v. Cortese, No. 70-5138. These cases were orally argued before and considered by only seven Justices of this Court (Justices Powell and Rehnquist not having assumed the bench at the time of oral argument) and the decision of this Court to which this Petition for Rehearing is directed was rendered by a single vote majority (four to three) of the Justices of this Court participating therein.

²Appendix A to brief of amicus, National Legal Aid and Defender Association, is a summary of state replevin laws.

effect for about as long as this Court has been deciding Constitutional questions. Surely it could appropriately remain in effect for the matter of months incident to resubmission of the cause, when the impact of the present decision will be a major disruption of the present credit structure.

The major premise of the present majority opinion seems to be that prior notice and a hearing are constitutionally required before prejudgment replevin, in order to prevent "substantively unfair and simply mistaken" repossessions, because "'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, _____ U.S. _ [page 13, slip sheet opinion] The procedure this Court has now engrafted on the prejudgment replevin procedure arguably acts to deter such "wrongs." The problem with it is that the secured creditor is gravely exposed to having wrong done to him which cannot be undone. Without attempting to judge the frequency of misuse, confiscation or destruction of collateral by debtors, it surely can be assumed that this problem is posed to the secured creditor with no less frequency, relatively, than the problem of "substantively unfair and simply mistaken" repossession is to the secured debtor. The difference is that the wrong cannot be undone, for most practical purposes, when the secured creditor is treated in a substantively unfair way.

While this case arose from the typical consumer credit transaction, the import of the present majority's opinion is not limited to consumer transactions. Indeed, reference is often made to the differences in form which hearings may take in different situations; but there is little doubt left that a hearing of some sort is necessary regardless of the economic setting leading to replevy by a secured credi-

tor3. The prejudgment replevin statutes now require indemnity bond to be posted before issuance of a writ; but the procedure imposed by the present majority opinion makes no provision for protection of the recognized property interest of the creditor pending the preliminary hearing now required. Under the statutes, the possibility for abuse of the remedy was recognized and appropriate requirements made; but the creditor (in the wholesale and retail markets) is now virtually helpless to preserve his collateral from destruction, removal, abuse, or other "substantively unfair" disposition. Instead, he must give notice that he intends to repossess, and must give the debtor time to do what he will about it. The length of time between notice and hearing will not be in control of the creditor, he will be embroiled in a court docket which will have to deal with this substantial additional calendar. While there may be a fairly high frequency of "no-shows" at preliminary hearings, the courts cannot predict default in advance, and thus the necessity will be to calendar all the hearings. Even allowing for a default rate, the length of time to preliminary hearings could be substantial. It is in any event a factor which is not within the control of the creditor, though creditor is now forced to bear the burden of it while debtor retains possession of the collateral.

As noted by Justice White in the present dissent (page 4, slip sheet opinion—dissent), creditors resort to repossession only in cases where no other alternative exists. Economics makes it much to the creditor's benefit "if the transaction goes forward and is completed as planned." (*Ibid.*) When repossession occurs, it is normally a salvage operation and not a profit-making one. (Affidavit of Vin-

³We rass, for the moment, the question of waiver, which will be discussed hereafter.

cent G. Morgan, Appendix p. 52) To the extent that the secured debtor's possessory interest in collateral is "dearly bought and protected by contract" [page 18, slip sheet opinion], the secured creditor's property interest in possession and preservation of the collateral is likewise dearly bought and protected by contract. Nothing in the majority opinion changes that fact. What is accomplished by the present decision is that, pending litigation, the debtor gets to continue using the collateral. Use of the property is not suspended, as is the practical effect of repossession under the statutes. Debtor is permitted to continue using the property.

What is the difference between debtor's use of the property during creditor's repossession efforts, and Family Finance's use of Mrs. Sniadach's wages pending their dispute? Is not the debtor put effectively in the position which this Court found constitutionally objectionable when Family Finance enjoyed it in the Sniadach case? Can the denial of creditor's property rights under the now required procedure be characterized as de minimis? How, consistently with procedural due process, can the debtor's disputed rights be given precedence and dominance over the creditor's disputed rights? That is precisely what the law will be if and when the majority opinion becomes final.

It should be noted that not all repossessions occur between parties occupying economic status similar to this case between Firestone and Mrs. Fuentes. In the retail market, thousands of small businessmen have depended on the inexpensive replevin remedy in making credit extension decisions. For those businessmen, large and small, who are in exquisite need of a predictable cash flow, the vagaries of court calendars could have a profound effect.

⁴Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

The assumption simply cannot be made that creditor's property rights are unimportant when compared with the rights of the consumer. Particularly is this so when the creditor stands to lose not only time but also the collateral. Under the present majority opinion, those who are disposed to do so can secrete, remove or destroy the collateral upon notice of the newly-required hearing. Considering the volume of automobile instalment credit, for instance, and the mobility of the collateral, the problem cannot be blinked away.

In varying degrees, the same problem applies to all portable or movable collateral. Under the now necessary procedure, the creditor has no assurance from the debtor either that the debt will be paid or the collateral will be forthcoming in the same condition as when replevin was sought. If the bond requirement is a "minimal deterrent" to misuse of the replevin remedy [page 15, slip sheet opinion], what deterrent at all exists in the case of a debtor who knows that his property will be repossessed as soon as a hearing is held? None—the plain fact is that under the present majority opinion the creditor is without practical remedy against the debtor who would act in a "substantively unfair" manner. The present decision will necessarily have the effect of encouraging purchasers to ignore contract obligations. In cases involving smaller purchases, the increased cost of repossession will make it economically impractical to enforce creditor's rights.

The inevitable effect of the additional hearing requirement engrafted by the present majority opinion on the replevin process will be the restriction or denial of credit to poor people—the very group with which the majority opinion is apparently most concerned. The cost of doing business will continue to dictate the nature of credit risks

businesses will take; and the increased cost of taking credit risks must necessarily result in restriction of credit extension to marginal credit applicants—poor people. In view of the dearth of evidence in the record that the remedy as presently applied operates to cause some injustice,⁵ the comparative property rights of parties to a secured transaction appear to be properly balanced under the present system. Despite the present majority's statements implying that due process has always required notice and hearing before civil pre-judgment attachments, the recognized state of the law now and in the time of Mr. Justice Holmes has been:

... nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect on the result of the suit. Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 31 (1928).

Judging the nature and reasonable effect of any change in the replevin procedure is properly a legislative function. On this record, the wholesale amendment of the replevin procedure is indeed "ideological tinkering with state law" [page 6, slip sheet opinion—dissent] which will inure to the detriment of the secured credit segment of our economy, both debtors and creditors. The one group of people who will be most dramatically injured is the marginal credit risk group—poor people.

The effect of the present majority's opinion on the wholesale secured transaction is also difficult to judge—but

There can be little doubt that, after preliminary hearings, Firestone will be ordered entitled to the chattels in question. With the exception of Rosa Washington in Parham, which involves an unconventional application of the remedy, it appears that the debtor—creditor law has been appropriately effectuated in all present cases, despite replevy without prior hearing.

distressing to contemplate. Under the law of UCC states, which encompasses almost all jurisdictions, secured inventory passes unemcumbered into the hands of retail purchasers despite the inventory lien. [Article 9 U.C.C. §9-307] A substantial portion of all inventory held for retail sale is held on inventory financing agreements which are remedied, when in default, by the replevin remedy, Each such transaction involves, by definition, volume which is many times in excess of ordinary retail transactions. The impact to both creditor and debtor of a defaulted secured wholesale transaction is likewise of greater importance to both parties because of the increased liabilities involved. When such a transaction goes "bad", and repossession becomes necessary, time is literally of the essence, Regardless of the perfunctory form of a pre-writ hearing, the delay incident to holding it would be an unconscionable advantage to a debtor and an unconscionable imposition on a creditor who has precious little time to enforce a security interest. If debtor is "substantively unfair" to creditor in this context, creditor has no practical remedy. Here, even more than in the retail transaction, the creditor has absolutely no interest in institution of replevin proceedings if there is any hope of completing the transaction as contemplated; and the size of the replevin bond is itself a relatively greater deterrent to filing suit in questionable cases. Here, the time factor involved is of greater significance. "Ideological tinkering" translates into unfair advantage, which creditor may be helpless to combat, and the economic effect of which can be severe.

On the matter of waiver of notice and hearing, the present majority opinion proceeds from an unsubstantiated and unwarranted assumption that people don't understand when they buy on time that the purchases will be repossessed if payments are not made. There are undoubtedly

things about financial transactions that are not commonly understood, but to reason that the contract waiver was not understood because it was not explained, [and because it did not recite that repossession would occur by statutory replevin, meaning prejudgment replevin without prior notice and hearing], is to rely on a naivete which common sense alone should reject. Mrs. Fuentes may not have mown that it would be called a replevin writ, but it is respectfully suggested that virtually everyone to whom credit is extended knows that repossessions occur for non-payment of the purchase price. Nothing could proceed more logically from the fact that possession was conferred before payment, than that possession is surrendered upon non-payment. The waiver problem posed by the present majority opinion is made almost insurmountable in the retail market by reference to the Overmyer criteria, found necessary in cases involving a waiver of all notice, any hearing, and any right to be heard.

Having referred to factors such as bargaining power, printed contract forms, and conditions of sale, the majority opinion has imposed waiver problems on the major retailers which may be impossible to overcome. Indeed, retailers such as Firestone may have no choice but to restrict credit to poor purchasers. There seems to be no way that Firestone could secure a knowing, "voluntary" waiver from someone like Mrs. Fuentes, and there is no point in extending credit to people who are poor credit risks when the repossession remedy is crippled in a way which removes

⁶D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), argued the same day as this case, involved a cognovit provision, the effect of which was to waive all notice and right to be heard prior to entry of judgment. In the replevin process, prejudgment replevy in Florida is followed by a trial on the merits of the right to possession. Debtor is given notice of the right to appear and to contest possession at the time the prejudgment writ is served.

any profit possibilities from high volume, high risk credit transactions.

In addition to these reasons for rehearing before the entire Court, there are reasons presented by the legal basis for the present majority opinion.

. . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. Federal Communications Com. v. WJR Goodwill Station. Inc. 337 US 265, 275, 276, 93 Led 1353, 1360, 69 S. Ct. 1097; Hannah v. Larche, 363 US 420, 442, 4 L ed 2d 1307, 1320, 1321, 80 S. Ct. 1502; Hagar v. Reclamation Dist. 111 US 701, 708, 709, 28 Led 569, 572, 4 S. Ct. 663. '"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time. place and circumstances.' It is 'compounded of history, reason, the past course of decisions . . .' Joint Anti-Fascist Refugee Committee v. Mc-Grath, 341 US 123, 162, 163, 95 L ed 817, 849, 71 S. Ct. 624.

As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. (concurring opinion)

Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961)

The "flexibility" of procedural due process requirements, with consideration for either the governmental functions involved or for the private interest affected, was recognized even in the decisions upon which the present majority principally has relied.7 This Court emphasized in Sniadach that it was dealing "with wages-a specialized type of property presenting distinct problems in our economic system" (395 U.S. at 340) and concluded that prejudgment garnishment under the Wisconsin statutes might. as a practical matter, "drive a wage-earning family to the wall." (395 U.S. at 341, 342) The same peculiar circumstances were deemed conclusive, and a prior hearing was required before termination of welfare benefits in Goldberg. This Court emphasized the "one overpowering fact which controls" (397 U.S. at 261), was the "'brutal need' ... [for] the very means by which to live." (397 U.S. at 261, 264).8 Recognition by the Court in Burson that "continued possession [of driver's licenses] may become essential in the pursuit of a livelihood" (402 U.S. at 539) was particularly applicable to the Georgia clergyman "whose ministry require[d] him to travel by car to cover three rural Georgia communities." (402 U.S. at 537).9

⁷Sniadach v. Family Finance Corp. 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); see also Stanley v. Illinois, — U.S. — (1972).

^{*}This Court quoted with approval in Goldberg its prior recognition, above quoted, in McElroy that procedural due process requirements are dependent upon the particular circumstances, with consideration of both the governmental function and the private interest involved.

⁹Again, in Burson, this Court recognized:

[&]quot;A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case."

⁽⁴⁰² U.S. at 540)

Yet, the present majority concluded that those decisions "were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life" and has now concluded, contrary to previous decisions, that a prior judicial hearing must be conducted before a temporary termination of a conditional possessory interest in any type of chattel, regardless of the circumstances. Nothing in this Court's past decisions imposes a pre-replevy hearing requirement to satisfy procedural due process. To the contrary, this Court stated in Ewing v. Mytinger & Casselberry, 399 U.S. U.S. 594, 599:

"It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. Phillips v. Commissioner, 283 U.S. 589, 596, 597, 75 L. Ed. 1289, 1296, 1297, 51 S. Ct. 608; Bowles v. Willingham, 321 U.S. 503, 520, 88 L. Ed. 892, 906, 64 S. Ct. 641; Yakus v. United States, 321 U.S. 414, 442, 443, 88 L. Ed. 834, 859, 64 S. Ct. 660."

The Court may wish to recede from its opinions in prior cases involving pre-judgment attachment; but to treat them as the logical precedent to the present majority opinion serves only to confuse the law. For instance, the majority notes that pre-judgment attachment without prior hearing was approved in *Ownbey v. Morgan*, 256 U.S. 94 (1921), because attachment was "necessary to secure jurisdiction in state court—clearly a most basic and important public interest." (page 23, slip sheet opinion, n.23) *Ownbey* approved seizure of property of a non-resident

¹⁰p. 20 of the majority opinion of this Court.

under a Delaware statute which afforded the non-resident opportunity to appear and defend only in the event of giving security for discharge of the seized property. Contention was made that the procedure denied due process because no defense could be raised without posting "forthcoming" security, and the non-resident claimed inability to post security because his only property was already under attachment. Thus, non-resident lost by statutory default. The present majority apparently approves this procedure, since it involves jurisdiction. We are unable to reconcile this holding with Boddie v. Connecticut, 401 U.S. 371 (1971), invalidating a filing fee requirement as condition to divorce action. There the requirement of paying filing fees was held invalid as denying due process to poor persons who wanted divorces. The issue was access to the courts, the same issue presented by Ownbey.

It is respectfully submitted that the two decisions cannot be reconciled, and that the present majority decision cannot be reconciled with prior decisions which have always approved the use of prejudgment attachments, except in the Sniadach instance. By reference to the opinion under appeal in McKay v. McInnes, 279 U.S. 820 (1928), it is perfectly clear what that case holds. It holds that pre-judgment attachments without prior notice and hearing are constitutionally permissible. Yet, the present majority appears to distinguish that case on the basis that it wasn't an opinion case. It is clear beyond all doubt what the issues were, 11 and what the decision of them was by this Court.

¹¹McInnes v. McKay, 141 Atl. 699 (Me. 1928). The Maine Court stated:

[&]quot;. . . although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet

It is therefore respectfully urged that this cause be re-submitted to the Court, now consisting of nine Justices. and that rehearing of the cause occur. A case of this importance, if it is to be decided by a one-vote majority, should be decided by a majority of the entire Court. The potential for a different result herein if the cause be submitted to the entire Court, and the potential for conflicting results when analogous cases are later presented to the entire Court, are sufficient reasons to order rehearing. In addition, however, the present majority recognizes but fails to deal with the property interest of creditors in secured chattels. The Constitution does not say that due process shall be afforded only to debtors, or only to poor people. It says that all property interests are to be protected. The present majority has gone to great lengths to protect the temporary possessory interest of debtors in secured chattels, but no attention has been paid to the property rights of the other party to the transaction. The procedure required by the present majority opinion denies due process of law to creditors.

conditional and temporary as it is, and part of the legal remedy and procedure by which the property of the debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is a deprivation without due process of law for it is a part of a process which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied." 141 Atl. at 702-03.

Certificate of Good Faith

The undersigned counsel for Appellee, The Firestone Tire and Rubber Co., being members of the bar of this Court, do hereby certify that this petition for rehearing is submitted in good faith and not for purposes of delay.

Respectfully submitted,

GEORGE W. WRIGHT, JR.

KARL B. BLOCK, JR.
1600 First National Bank Building
Miami, Florida
Attorneys for Appellee,
The Firestone Tire & Rubber
Company

MERSHON, SAWYER,
JOHNSTON, DUNWODY &
COLE
1600 First National Bank Building
Miami, Florida
Of Counsel for Appellee,
The Firestone Tire & Rubber
Company

PROOF OF SERVICE

I HEREBY CERTIFY that on this ____ day of July, 1972, service of three copies of the printed Petition For Rehearing of Appellee, The Firestone Tire and Rubber Company, was duly made upon the following depositing same in a United States mail depository, with first class (or air mail as to those residing more than five hundred miles from Miami, Dade County, Florida) postage prepaid: BRUCE S. ROGOW, ESQ., DONALD C. PETERS. ESQ., RENE V. MURAI, ESQ., Legal Services of Greater Miami, Inc., 622 N. W. 62nd Street, Miami, Florida 33150; and C. MICHAEL ABBOTT, ESQ., 2837 Pittsfield Boulevard, Ann Arbor, Michigan, Attorneys for Appellant; DANIEL S. DEARING, ESQ., Office of the Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee, Robert L. Shevin, Attorney General of the State of Florida; ALLAN ASHMAN, ESQ., R. PATRICK MAX-WELL, ESQ., 1155 East 60th Street, Chicago, Illinois 60637. Attorneys for Amicus Curiae, National Legal Aid and Defender Association; THOMAS L. EOVALDI, ESQ., Professor of Law, Northwestern University, School of Law. Chicago. Illinois. Of Counsel for Amicus Curiae, National Legal Aid and Defender Association; JEAN CAMPER CAHN, ESQ., BARBARA B. GREGG, ESQ., 1145 19th Street, N.W., Suite 509, Washington, D.C. 20036, Attorneys for Amicus Curiae, Urban Law Institute of the National Law Center of George Washington University; BLAIR C. SHICK, ESQ., MARK BUDNITZ, ESQ., DONALD FOSTER, ESQ., RICHARD A. HESSE, ESQ., 38 Commonwealth Avenue, Brighton, Massachusetts 02135, Attorneys for Amicus Curiae, National Consumer Law Center of Boston College Law School; HARRY N.

(Certificate of Service Continued on Next Page)

BOUREAU, ESQ., PHILLIP G. NEWCOMM, ESQ., ERIC B. MEYERS, ESQ., First National Bank Building, Miami, Florida 33131, Attorneys for Amicus Curiae, General Motors Acceptance Corporation; ROBERT L. CLARE, JR., ESQ., GEORGE J. WADE, ESQ., 53 Wall Street, New York. New York 10005, Attorneys for Amicus Curiae, The National Cash Register Company; ROSS L. MALONE, ESQ. and SHUTTS & BOWEN, ESQS., First National Bank Building, Miami, Florida 33131; SHEARMAN & STERLING, ESQS., 53 Wall Street, New York, New York 10005; DIXON, BRADFORD, WILLIAMS, Mc-KAY & KIMBRELL, P.A., 9th Floor, Dade Federal Building, Miami, Florida 33131; JEPEWAY, GASSEN & JEPEWAY, ESQS., 101 E. Flagler Street, Miami, Florida 33131; LYNN & LYNN, ESQS., 11 North Pearl Street, Albany, New York 12207; MOORE, WELBAUM, ZOOK & JONES, ESQS., Biscayne Building, Miami, Florida; Of Counsel for Amici Curiae, General Motors Acceptance Corporation, Chrysler Credit Corporation, Ford Motor Credit Company, Universal CIT Corporation, American Industrial Bankers Association. White Motor Company, National Cash Register Company.

KARL B. BLOCK, JR.
1600 First National Bank Building
Miami, Florida 33131
Attorneys for Appellee,
The Firestone Tire & Rubber
Company

Supreme Court, u. s. FILED

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ECOF Supreme Court of the United States

OCTOBER TERM 1970

NO. 70-5039

MARGARITA FUENTES,

Appellant,

VS.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER CO.,

Appellees.

PETITION FOR REHEARING

ROBERT L. SHEVIN Attorney General of Florida

DANIEL S. DEARING Chief Trial Counsel

Department of Legal Affairs The Capitol Tallahassee, Florida 32304

OCTOBER TERM 1970

NO. 70-5039

MARGARITA FUENTES,

Appellant,

vs.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

PETITION FOR REHEARING

Appellee Robert L. Shevin, Attorney General of the State of Florida, petitions the Court for rehearing of the instant cause. This petition is based upon the following reasons:

I.

The decision of the majority undermines a valid state interest. The issue briefed and argued included the vital question as to whether the State of Florida has a governmental interest of sufficient validity to justify its statutory scheme of replevin. The State maintained in its brief, stressed in oral argument, and reiterates here that it has a valid interest in conserving personal property pending a judicial determination of which of two claimants has a prior right of possession. The statute presumes a right to possess the property in one party or another. It provides for state action to preclude necessity for self-help. It contemplates conserving the property, not confiscation of it. It insists that a judicial determination of the right to possession be instituted by the party bringing suit. It speaks to preservation of the property pending outcome.

The state has a responsibility and a duty to protect property of all its citizens, corporate as well as private, commercial as well as non-commercial. Moreover, it has a vital interest in protecting its economy.

The majority opinion ignores these state interests completely. It treats previous cases dealing with collection of internal revenue, the war effort, bank failure, misbranded drugs, and contaminated foods as standards by which all state interests must be measured. The State of Florida respectfully demurrs.

There are other interests which, if less dramatic, are nonetheless vital.

Protection of property, contract, and established bases for a credit-oriented economy are certainly legitimate state interests. These interests are delicately balanced. Their weights are measured by demands of the marketplace. The economy is based largely on credit purchases because that is what the marketplace requires.

Rules of the marketplace are reflected in statutes such as the Uniform Commericial Code. Chapter 675, 679, Florida Statutes. The Code describes safequards for the consumer, but it also recognizes rights of the seller. Necessary to enforcement of those rights are remedial statutes. These include forms of action known as replevin, detinue, attachment, and garnishment. They exist in statutes of every state, though they may vary in form and effect, procedure and application. Most of these remedies provide summary procedures. In Florida, they combine summary possession with immediate judicial action: replevin, as the Court has noted, is commenced with the filing of a complaint and the posting of a bond. They are an integral part of a consumer-credit economy.

When the Court states, as the majority opinion does, that Florida's replevin statute serves no important governmental or general public interest, it discounts a major responsibility of the state.

The majority opinion raises the question of possible malicious use of replevin; a misuse of state process to harass or intentionally obstruct private enjoyment of one's property. This possibility was not covered in briefs, but is nonetheless admitted. The Court's concern on this point gives rise to two observations.

First, no citizen is immune from malicious use of process. We are all subject to suit at another's whim or caprice. Moreover, we are subject to criminal prosecution and jail at the malicious (or erroneous) instance of one who falsely (or mistakenly) swears out a warrant or names us as culprit. We are subject to such possibility for no other reason than that we are citizens of a democratic state. Without benefit of a hearing we may be temporarily deprived of liberty and property by state action at the instance of another. There is no known judicial or legislative immunization from such an occurrence. But this does not mean we should abolish arrest until after a hearing, or require prior approval of a judicial officer before civil summons issues.

Second, the number of private, as opposed to commercial, plaintiffs in replevin actions is of de minimis proportions. The overwhelming number of such actions arise out of debtorcreditor relationships or installment-purchase transactions. The same economic considerations which make prejudgment

replevin a viable remedy militate against irresponsible use of state process. Demands of the marketplace protect the credit-buyer as much as the seller.

It is respectfully submitted that when the majority opinion characterizes procedures under Florida's replevin statute as no more than "state intervention in a private dispute", it demonstrates that Appellees have failed to communicate a vital point in the course of this appeal. The extent of the state's interest reflected in its statutory scheme of replevin should be fully communicated to this Court on rehearing.

II.

The decision of the majority sweeps this case far beyond the perimeters of its facts. Mrs. Fuentes was no stranger to installment buying (A 24-26). She had made several purchases on "time" payments. While it is true that she made certain payments on her stove and stereo set, it is also true that she had not paid the full purchase price due. It was stipulated that she had failed to pay. Under express terms of the contract she signed, she was in default. It was not a complicated transaction. Mrs. Fuentes had previously entered into five such transactions with Appellee Firestone. She was not unaware of her obligation to pay for the goods she purchased.

As the Court noted, the contract Mrs. Fuentes signed provided that "in the event of default of any payment or payments, Seller at its option may take back the merchandise " There is no question that this provision was part of a printed form contract. But the remedy—repossession of merchandise for which payment is not made—can hardly be deemed to be unique. Such a seller's remedy is typical to installment sales contracts.

In Part VII of the majority opinion, the Court suggests that because the transaction was evidenced by a printed form contract between parties of unequal bargaining power, the installment buyer should not be held accountable to a contract term providing for payment as agreed or repossession of the goods. This rationale has been used to strike small-print warranty disclaimers in other so-called "contracts of adhesion" on the ground that a buyer has a right to expect the goods he buys to be free of flaws and suitable for normal use. The Uniform Commercial Code now regulates use of such disclaimers, precluding the element of surprise. But it should surprise no one that a timepayment purchaser must pay in full according to an agreed schedule for the goods he selects, contracts for, and takes home with him. To the extent that Mrs. Fuentes is representative of installment buyers generally, it must be recognized that she is on an equal bargaining basis with the installment seller whose sales contracts are shaped to meet demands of the marketplace.

It is an accepted tenet of contract law that all contracts are deemed to include applicable statutory law. Even if that were not so, it is doubtful whether a recital in the printed form expressly obligating the seller to proceed by prejudgment replevin would have benefitted Mrs. Fuentes any more than did the statement quoted above.

In any case, Mrs. Fuentes was notified by mail, by telephone, and by telegram that unless she made payments as agreed, the stove and stereo set would be repossessed. The first notification was mailed in May, 1969, a month after her last payment. Suit was not filed until September of that year. When summons was served, and the goods were replevied, the deputy sheriff was advised that Mrs. Fuentes had received legal advice. The recital of facts in Part I of the majority opinion indicates that Appellees failed to communicate the factual nature of the controversy from which the instant appeal was taken.

The Court recognizes in footnote 21 to Part V of the majority opinion that formal notice and hearing procedures would not be requisite to all actions enforcing seller's remedies; that certain instances would warrant informal practice. It is submitted that Mrs. Fuentes was given ample informal notice that unless she paid for the goods she bought, action would be taken to repossess them. She ignored the contract, the notifications, and any obligation she might have had.

Yet when suit was filed and the goods taken into custodia legis, five months after her last payment, she complained that her right to due process of law had been violated. To strike Florida's statutory scheme to provide a seller's remedy in this context is a strong indication that Appellees have failed to communicate the factual nature of this controv rsy and that a rehearing should be granted.

III.

The decision of the majority leaves installment sellers and creditors with no choice but to increase the cost of credit to consumers. As a practical result of requiring notice and a hearing, regardless of the degree of formality legislated, the peril of irresponsible treatment of purchased goods by the defaulting buyer will be increased. To this may be added higher legal fees and costs. These increased costs must be borne by those who maintain their contract commitments as well as by the few who default.

Moreover, it is submitted that the opinion of the majority will lead to more litigation added to the "progeny" of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), to the end that all pre-hearing creditor remedies such as attachment, garnishment, and detinue, enforced as statutes of the several states, will be attacked. It is respectfully submitted that these cases will overlook the fact that creditors

also have a possessory interest in property to be protected, and that statutes such as Florida's replevin scheme recognize that interest and seek to protect it by conserving the property in dispute pending adjudication of the cause. State action, rather than self-help, is important to debtor as well as creditor. To deny summary state action in this context is to increase the risk that property 'unlawfully detained' will be removed from the state or damaged.

For reason of the serious economic implications of the majority opinion, the State of Florida, through Appellee Robert L. Shevin, Attorney General, respectfully requests this Court to grant its petition for rehearing.

CERTIFICATE OF GOOD FAITH

I, Daniel S. Dearing, a member of the Bar of the Supreme Court, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for reasons of delay.

Respectfully submitted,

ROBERT L. SHEVIN Attorney General of Florida

DANIEL S. DEARING Chief Trial Counsel Department of Legal Affairs The Capitol Tallahassee, Florida 32304

Attorney for Appellee Robert L. Shevin

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APPENDER

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Na. 70-5138

MITCHEL ROTH, BY AL,

Assessed V. Consume, or AL.

Appellen.

APPEAL PROMETHE DIGITED STATES DESCRIPT COURT FOR THE EASTERN DISCRETE OF PERSONS VANDA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5138

MITCHELL EPPS, ET AL.,

Appellants,

v.

AMERICO V. CORTESE, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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ers gr auperis	anting motion for leave to proceed in forms

Civil Action No. 70-2592

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated

V8.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County; WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County; LEWIS WASHINGTON, GOVERNMENT EMPLOYEES EXCHANGE CORP., and SEARS, ROEBUCK AND COMPANY

Basis of action: Civil Rights

Jury trial claimed by

on

. 19

For Plaintiff:

Joel Weisberg, Esq., Community Legal Services, Inc., 313 S. Juniper St. 19107

For Defendant:

Levy Anderson, City Solicitor, for AVCortese & WM Lennox, 1520 Municipal Services Bldg. 19107

Shestack, Herman & Bayer for G.E.X. Corp. (19107), 1000 Bankers Securities Bldg.

Harry L. Devoe, Esq. and Robert F. Maxwell, Esq. for Sears, Roebuck & Co., 4640 Roosevelt Blvd. 19132

Date -	Plaintiff's Account	Received	Disbursed
Sep 70 Sep 21, 1970	48349 TO U.S. TREAS.	15	15
8-71 12-71	54920 (Approved) Treas	5	5

DATE			FILINGS—PROCEEDINGS
	1970		
1	Sept	18	Complaint filed.
-	"	18	Summons exit.
(1)	"	18	Plffs' motion for temporary restraining order, filed.
(1)	44	18	Plffs' motion to convene Three-Judge Court, filed.
	"	18	Hearing sur Plff's petition for temporary restraining order. Partially granted. Order signed.
(1)	44	29	Order dtd 9/18/70 that property of Plff. Rosa Bell Washington seized by Deft. Lennox, be returned, filed. MT 9/30/70 entered and copies mailed (incl. Gov. and Att. Gen.)
_	a +	25	Hearing sur Temporary Restraining Order—signed 9/18/70. Deft. L. Washington, sworn.MT Order dtd 9/18/70 is VACATED—order signed.
2	"	29	Order dtd 9/25/70 that order dtd 9/18/70 is VACATED, filed. 9/30/70 entered and copies mailed (incl. Gov. & Att. Gen.)
3	Oct	5	Order dtd 10/2/70 designating Hon. J. Cullen Ganey, U.S. Circuit Hastie, Judge, and Hon. John B. Hannum, to sit with Hon. E. Mac
-			Troutman for the hearing and determination of this case, filed. 10/6/70 entered and copies mailed (incl. Gov. & Att. Gen.)
4	**	9	Answer of Gov. Employees Exchange Corp., and Counter-Claim, filed.

	DAT	ישיי	BILLY CO.
_	DATE		FILINGS—PROCEEDINGS
	197	0	
5	•	' 18	Answer of Sears, Roebuck & Co., filed.
6	•	13	
. 7	"	13	Motion of Sears, Roebuck & Co. for Summary Judgment, filed.
8	44	19	Affidavit of Albert C. Twyman re service of Summons and Complaint on Defts, filed.
9	66	19	Plffs' Motion for Summary Judgment, filed.
10	"	19	Plffs' Motion to dismiss Deft. Government Employees Exchange Corp.'s Counter-Claim, filed.
11		19	Plffs' Motion for a preliminary injunction re- straining Defts. Lennox and Cortese from fur- ther issuance and execution of writs of re- plevin with bond, etc., filed.
12	. "	20	Defts. Cortese & Lennox's Motion to Dismiss Complaint, filed.
13	66	22	Plffs' Memorandum of Law in support of their Motion for preliminary injunction, filed.
_	"	22	Hearing re Preliminary Injunction. MT Counsel to submit briefs and stipulations by 11/2/70. Hearing continued.
14	Nov	10	Stipulation of counsel for Plffs' & Sears, Roebuck & Co. as to certain transaction, filed.
15		10	Stipulation of counsel re: writs of replevin with bond which are issued by Deft. Cortese, etc., filed.

	DATE		FILINGS—PROCEEDINGS
_	1970		-
16	"	10	Stipulation of counsel re: regulation for issuance of writs of replevin and requirements for execution of same, filed.
17	"	10	Plffs' supplementary memorandum in support of motions for preliminary injunction and sum- mary judgment, filed.
18	Dec	9	Letter dtd 11/17/70 from Jeffrey A. Ernico, Esq., Commonwealth of Pa., to Clerk of Court, re Notice to file a Brief, filed.
19		9	Brief of Sears, Roebuck & Co. in Support of Motion for Summary Judgment and Dismissal of action brought against it, filed.
	1971		
-	Jan	13	Argued sur Plff's motion for Preliminary Injunction—C.A.V. Gan
20	"	27	Letter dtd 1/20/71 to Hon. E. MacTroutman re granting preliminary injunction, filed. MT
21	Mar	31	Opinion Ganey Circuit Judge, Troutman J. and Hannum J. and Order that plffs. motions for summary judgment are DENIED; that defts. motions for summary judgment are GRANTED, filed. 3-31-71 entered & notice mailed on 4-1-71
22	Apr	8	Plffs' Notice of Appeal to the Supreme Court of the United States, filed.
23	"	8	Plffs' Affidavit of Service re Notice of Appeal, filed.

SUPPLEMENTAL DOCKET ENTRIES

DATE			FILINGS—PROCEEDINGS		
	1971				
-	Apr	30	Original record transmitted to Clerk, Supreme Court of the United States.		
24	Jul	6	Copy of transcript of 9/25/70, filed.		

[Clerk's Certificate to Foregoing Paper Omitted in Printing]

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS

υ.

AMERICO V. CORTESE, ET AL., DEFENDANTS

COMPLAINT—CLASS ACTION—Filed September 18, 1970

1. This is a civil action brought by named and class plaintiffs to have declared unconstitutional certain statutes and rules of state-wide application which establish the procedure for the replevy of goods in the Commonwealth of Pennsylvania, under which creditors and others are permitted to obtain immediate possession of goods from those lawfully in possession thereof without the requirement of any prior hearing or of notice to those in lawful possession. Also sought are preliminary and permanent injunctions restraining the Sheriff and Prothonotary of Philadelphia from issuing writs of replevin with bond or seizing property on the authority of such writs.

JURISDICTION

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1343, Title 42 U.S.C. § 1983, Title 28 U.S.C. §§ 2281, 2284, and Title 28 U.S.C. § 2201 and 2202, this being an action seeking to have declared unconstitutional state statutes and rules of statewide application and an action for preliminary and permanent injunctions to redress deprivations, under color of state law, of rights, privileges, and immunities secured to plaintiffs by the United States Constitution.

3. Plaintiffs have no adequate remedy at law and will continue to suffer irreparable harm from the state procedures complained of herein unless equitable relief is accorded them as prayed for herein.

PARTIES—CLASS ACTION ALLEGATIONS

4. The plaintiffs are:

(a) Mitchell Epps, a citizen of the United States and a resident of the Commonwealth of Pennsylvania with his residence at 1824 Bainbridge Street, Philadelphia, Pennsylvania.

(b) Paul and Ellen M. Parham, citizens of the United States and residents at 611 North 54th

Street, Philadelphia, Pennsylvania.

(c) Rosa Bell Andrews Washington, a citizen of the United States and a resident at 5343 Delancey Street, Philadelphia, Pennsylvania.

(d) Pursuant to Fed. R. Civ. P. 23(a) and 23(b)

(2)

all persons who are residents of the Commonwealth of Pennsylvania and who are or may be subject to the issuance of writs of replevin with bond by the Prothonotary of the Courts of Common Pleas of Philadelphia County and the seizure of their personal property on the authorization thereof.

5. The named plaintiffs, as individuals subject to the seizure of their property on writs of replevin with bond issued under the statute and rules here in question, fairly and adequately represent the class of plaintiffs described in paragraph 4(d) above on whose behalf they sue, and the persons constituting said class are so numerous as to make it impractical to bring them all before this Court.

6. The Defendants are:

(a) Americo V. Cortese, Esquire, the Prothonotary of the Court of Common Pleas of Philadelphia County, who is charged with the responsibility of processing praccipes for writs of replevin and issuing said writs, and who maintains offices at 288 City Hall, Philadelphia, Pennsylvania.

(c) Lewis Washington who is employed as a deputy sheriff of Philadelphia County, and resides at 4228 West Girard Avenue, Philadelphia, Pennsylvania.

(d) Government Employees Exchange Corp., a corporation doing business in New Jersey, with a business address at Kaign Avenue and Crescent

Boulevard, Pennsauken, New Jersey.

(e) Sears, Roebuck and Company, a New York Corporation authorized to do business in Pennsylvania on June 14, 1920, which has an official mailing address c/o C. T. Corporation Systems, 123 South Broad Street in Philadelphia and which has its principal place of business at Adams and Whitaker Avenues in Philadelphia,

Pennsylvania,

(f) and a class described as all creditors or others who instituted actions of replevin with bond and have had property seized or may have property seized by the Sheriff of Philadelphia County on the authority of such writs of replevin issued against members of the class of plaintiffs set forth in paragraph "4(d)." Said class of defendants is designated pursuant to Fed. R. Civ. P. 23(a) and 23(b) (2). The members of said class will be fairly and adequately represented by the named defendants and are so numerous as to make their joinder impractical.

STATEMENT OF CLAIM

7. The Commonwealth of Pennsylvania provides by statute, Act of 1705, 1 Sm. L. 44, § 12, 12 P.S. § 1821, and Act of April 19, 1901, P.L. 88, as amended, 12 P.S. §§ 1824-1845, and by rule of Court, Pa. R. Civ. Pro. 1071-1087, for the immediate seizure of personal property held in peaceful possession, on the demand of an allegedly aggrieved creditor, without the intervention of a court of law or other impartial body, and without any

prior notice of such seizure to the aggrieved individual

in possession.

8. The statutes and rules in question provide for the issuance of a writ of replevin with bond by the Prothonotary of the Court of Common Pleas and the seizure of property pursuant to such writ by the Sheriff of the County merely upon the filing of a praecipe for a writ, along with a bond on the amount of double the value of the property taken. The value of such property is determined by the party seeking the seizure, Pa. R. Civ. Pro. 1073.

9. The statutes and rules in question, which require no notice prior to the service of the writ, provide that the Sheriff shall take possession of the property designated in the writ at the time of the service of said writ. Pa. R. Civ. Pro. 1074.

10. The Sheriff is required by the writ to locate the property, seize it and remove it with or without the

consent of the individual in possession,

11. An individual whose peaceful possession has been disturbed may reclaim possession of his property only by the filing, within seventy-two (72) hours, of a counterbond in the same amount as that filed to initiate. Pa. R. Civ. Pro. 1076.

12. The Sheriff is required to deliver the seized property to the plaintiff on the writ if no bond is filed within the seventy-two (72) hour period. Pa. R. Civ. Pro.

1077.

13. The form of writ required by rule of Court, Pa. R. Civ. Pro. 1354, contains no notice that the plaintiff may recover his property by filing such a bond within seventy-two (72) hours, nor, in fact, does it contain any mention of such bond

14. Should such property be immune or exempted from replevin, such claim may be raised only after seizure and removal by the filing of preliminary objections.

Pa. R. Civ. Pro. 1078.

15. No complaint need be filed at the time of seizure and removal, and the individual in possession, notified by the writ that he must defend the action commenced against him, is given notice of neither, the nature of the action against him nor its underlying cause.

Complaint of Mitchell Epps

16. During the past two years, Plaintiff Mitchell Epps, an employee of the federal government, made a number of purchases from Defendant Government Employees Exchange Corporation. The purchase items included a General Electric stereo, a watch, a television antenna, a

carpet, and male and female wedding rings.

17. Although each of the above items require different installment payments, Defendant Government Employees Exchange Corporation consolidated them so that Plaintiff Epps was required to pay approximately \$35.00 per month for them all. In fact, Plaintiff Epps never received the carpet he purchased in early 1970 although presumably he was being charged for it as part of his monthly payments.

18. At all times since the purchase of these items, Plaintiff Epps has been making full and timely monthly payments to Defendant Government Employees Exchange Corporation. Never was he notified by the Defendant corporation that he was tardy or owing in these payments nor could he have truthfully been notified of this.

19. Nevertheless, on Friday, September 11, 1970, without any prior notice or hearing, Sheriffs Joseph Di-Stefanis and John DiIulio came to Plaintiff Epps' premises at 1828 Bainbridge Street, with a Writ of Replevin bonded in the sum of \$2200.00 and attempted to take all of the items mentioned above. A true and correct copy of the writ served on Plaintiff Epps is attached hereto and marked as Exhibit "A".

20. When Sheriffs DiStefanis and DiIulio came to Plaintiff Epps' premises, the only person home was Mr. Epps' wife. Surprised at the presence of these people, Mrs. Epps asked them to identify themselves, but they failed to do so. She then telephoned her husband at work who told her to call the police and wait until he

came home.

21. It was not until Plaintiff Epps returned home that the sheriffs identified themselves. When Plaintiff Epps explained to them that he was current in his payments for all the items, the sheriffs indicated that this did not concern them.

22. Plaintiff Epps then called Defendant Government Employees Exchange Corporation and, in the presence of Sheriff DiStefanis, was told that he was indeed current

in all his installment payments.

23. Sheriff DiStefanis, upon hearing that Plaintiff Epps was not in default on his installment payments, responded by disregarding the admissions made by Defendant Government Employees Exchange Corporation

and replevied the General Electric stereo.

24. At no time prior to the taking of his stereo did Plaintiff Epps ever receive notice of the Writ of Replevin. Thus deprived of his property without due process of law, Plaintiff Epps remains aggrieved, never having had any complaint served upon him by Defendant Government Employees Corporation.

25. Furthermore, Plaintiff Epps is financially unable to meet the costs of obtaining a counterbond, which is the only means which he has of recovering his property.

Complaint of Paul and Ellen M. Parham

26. Plaintiffs Paul Ellen M. Parham, who are presently compelled to depend solely on grants from the Department of Public Welfare to support themselves and their child, purchased a kitchen table and two chairs and a bed from Defendant Sears, Roebuck and Company some time in February, 1969, at a total cost of approximately \$385, payment to be made in monthly installments of \$16.50.

Plaintiffs Parham duly made payments to Defendant Sears until January, 1970. At this time, Plaintiff Paul

Parham lost his job.

28. Since that time, Plaintiffs Parham have made several payments, the most recent being a payment of \$20 on or about September 1, 1970. 29. On September 15, 1970, without any notice, two deputy sheriffs appeared at the Parhams' house with a truck. Only Plaintiff Ellen M. Parham was present.

30. The two men served upon Mrs. Parham a writ of replevin with bond, issued by defendant Cortese. A true and correct copy of this writ is attached hereto and marked Exhibit "B". They informed her that they were empowered to seize the table, chairs, and bed forcibly if necessary.

31. Mrs. Parham was told only that her goods would remain in the possession of the sheriff for 72 hours, and that if she wanted to discuss the replevy with anyone,

she would have to contact the sheriff or Sears.

32. Therefore, Plaintiffs Parham have been deprived of their property as a result of a proceeding in which they were not able to take part, having received no notice before their property was taken.

33. Furthermore, Plaintiffs Parham are financially unable to meet the cost of obtaining a counterbond, the

only means of recovering their property.

Complaint of Rosa Bell Andrews Washington

34. Plaintiff Rosa Bell Andrews Washington has filed for a divorce from her husband Defendant Lewis Washington and is awaiting the approval of the Court of a Minister's Report, filed September 1, 1970, recommending that a divorce be granted.

35. Plaintiff Washington is presently living with her two children, a girl four years of age and a boy eleven years of age, in the home of her sister Lillie Perkins at

5343 Delancey Street, Philadelphia.

36. On September 14, 1970, the Family Court Division of the Court of Commons Pleas of Philadelphia County ordered Defendant Washington to provide support for his children in the sum of forty-five dollars per week.

37. On September 14, 1970, Defendant Washington, a deputy sheriff of Philadelphia County filed with defendant Cortese a praecipe for a writ of replevin with bond, along with a bond for two hundred dollars, twice the alleged value of the property to be seized.

- 38. During the morning hours of September 17, 1970, Defendant Washington and two other deputy sheriffs, armed with a writ of replevin with bond, appeared at 5343 Delancey Street and demanded entrance on threat of arrest.
- 39. Plaintiff Washington received no notice of the action taken against her prior to the arrival of the deputies at her home, at which time she was informed that they intended to seize and remove: a bed, 2 dressers, a clothes cabinet, a child's pool table, a 2 wheeled bicycle, a child's pin ball machine, a desk with a lamp and a variety of boys clothing. A copy of the writ served on Plaintiff Washington is attached hereto and marked as Exhibit "C".
- 40. All of the property named in the writ was in fact removed, leaving Plaintiff Washington, her son and her daughter deprived of many items necessary to their continued health and welfare.

41. Furthermore, Plaintiff Washington is financially unable to meet the cost of obtaining a counter bond, the

only means of recovering their property.

42. The Acts of 1705, 1 Sm. L. 44, § 12, 12 P.S. § 1821, and April 19, 1901, P.L. 88, as amended, 12 P.S. §§ 1824-1845, and Pennsylvania Rules of Civil Procedure 1071 to 1087 are contrary to the United States Constitution in that:

- (a) said Acts and Rules have the effect of permitting the Sheriff to invade the privacy of the home in order to conduct a search and seize property without a warrant and without probable cause in violation of rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution;
- (b) said Acts and Rules have for their purpose the establishment of a procedure under which individuals are deprived of their property without due process of law guaranteed by the Fourteenth Amendment to the United States Constitution; and
- (c) said Acts and Rules have the effect of denying low-income individuals access to the Courts to regain possession of their property, thus denying them the equal

protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray that:

1. The Court convene a three-judge District Court as

required by Title 28 U.S.C. §§ 2281 and 2284.

2. The Court declare the Acts of 1705, 1 Sm. L. 44, § 12, 12 P.S. § 1821, and April 19, 1901, P.L. 88, as amended, 12 P.S., 1824 to 1845, and Pennsylvania Rules of Civil Procedure 1071 to 1087 and any operations thereunder to be unconstitutional and invalid.

3. The Court preliminarily enjoin and, after full hearing, permanently enjoin defendants Sheriff Lennox and Prothonotary Cortese, their deputies, agents, and others acting in concert with them from proceeding pursuant

to the above acts and rules.

4. The Court grant such other relief as shall be necessary and proper.

/s/ Joel G. Weisberg

/s/ David A. Scholl

/s/ Harold I. Goodman

/s/ Peter W. Brown

/s/ Harvey H. Schmidt

[Duly sworn to by Mitchell R. Epps jurat omitted in printing (all in italics)]

[Duly sworn to by Paul Parham jurat omitted in printing (all in italics)]

[Duly sworn to by Ellen M. Parham jurat omitted in printing (all in italics)]

[Duly sworn to by Rosa Bell Washington jurat omitted in printing (all in italics)]

EXHIBIT A TO COMPLAINT

Replevin With Bond

THE COMMONWEALTH OF PENNSYLVANIA COUNTY OF PHILADELPHIA

COURT OF COMMON PLEAS NO.

TRIAL DIVISION AUG. TERM, 1970

No. 4082

GOVERNMENT EMPLOYEES EXCHANGE CORP.

vs.

MITCHELL R. EPPS and JACQUELINE EPPS

TO THE SHERIFF OF THE COUNTY OF PHILA-DELPHIA:

YOU ARE DIRECTED to replevy the following property(1):

G.E. Stereo Model #C443	\$450.00
5X15 Carpet	250.00
Wedding Ring-Male	100.00
Wedding Ring—Female	100.00
Diamond Watch	100.00
T.V. Antennae (roof)	100.00

You are directed to notify⁽²⁾: MITCHELL R. EPPS and JACQUELINE EPPS, 1828 Bainbridge Street, Philadelphia, Penna., Defendant(s), that⁽³⁾ GOVERNMENT EMPLOYEES EXCHANGE CORP., Plaintiff(s), has (have) commenced an Action of Replevin With Bond, which said Defendant(s) is (are) required to defend.

If the property replevied is found in the possession of anyone not a Defendant, you are directed to notify him that he has been added as a Defendant, and is required to defend the action.

AMERICO V. CORTESE Prothonotary

By /s/ R. Paglia Clerk

Date Aug. 27, 1970

A TRUE COPY

Attest:

/s/ P. Scarpello Deputy Sheriff

⁽¹⁾ Specifically describe property.

⁽²⁾ Name(s) of Defendant(s).

⁽⁸⁾ Name(s) of Plaintiff(s).

EXHIBIT B TO COMPLAINT

Replevin With Bond

THE COMMONWEALTH OF PENNSYLVANIA COUNTY OF PHILADELPHIA

C. P.

COUNTY COURT SEPTEMBER TERM, 1970

No. 737

SEARS, ROEBUCK AND Co.

vs.

PAUL PARHAM, 611 North 54th St., Phila., Pa.

TO THE SHERIFF OF THE COUNTY OF PHILA-DELPHIA:

YOU ARE DIRECTED to replevy the following property(1):

- One (1) Harmony House Table #4S and 4 stools
- One (1) Harmony House Divan Bed, #48087

You are directed to notify⁽²⁾: PAUL PARHAM, Defendant(s), that⁽³⁾ SEARS, ROEBUCK AND CO., Plaintiff(s), has (have) commenced an Action of Replevin With Bond, which said Defendant(s) is (are) required to defend.

If the property replevied is found in the possession of anyone not a Defendant, you are directed to notify him that he has been added as a Defendant, and is required to defend the action.

AMERICO V. CORTESE Prothonotary

By /s/ J. Gargiulo Clerk

Date Sep. 11, 1970

A TRUE COPY

Attest:

/s/ C. Dewdy & G. Edwardy Deputy Sheriff

⁽¹⁾ Specifically describe property.

⁽²⁾ Name(s) of Defendant(s).

⁽³⁾ Name(s) of Plaintiff(s).

EXHIBIT C TO COMPLAINT

Replevin With Bond

THE COMMONWEALTH OF PENNSYLVANIA COUNTY OF PHILADELPHIA

COURT OF COMMON PLEAS NO. SEPT. TERM, 1970

No. 1154

LEWIS WASHINGTON

V8.

ROSA BELL ANDREWS, 5343 Delancey St., Phila., Penna.

LILLIE PERKINS, 5343 Delancey St., Phila., Penna.

TO THE SHERIFF OF THE COUNTY OF PHILA-DELPHIA:

YOU ARE DIRECTED to replevy the following property(1):

Folding Bed
Mahogany Dresser
White Dresser
Metal Cabinet for Clothes
Pool Table
2 Wheel Bicycle
Pin Ball Machine
Desk with Lamp
Boys Clothes

You are directed to notify⁽²⁾: ROSA BELL ANDREWS, 4343 Delancey St., Phila., Penna. and LILLIE PERKINS, 5343 Delancey St., Phila., Penna., Defendant(s), that⁽⁸⁾ Lewis Washington of 4228 W. Girard

Avenue, Phila., Pa. 19104, Plaintiff(s), has commenced an Action of Replevin With Bond, which said Defend-

ant(s) (are) required to defend.

If the property replevied is found in the possession of anyone not a Defendant, you are directed to notify him that he has been added as a Defendant, and is required to defend the action.

> AMERICO V. CORTESE Prothonotary

By /s/ J. Gargiulo Clerk

Date Sept. 14, 1970

Attest:

/s/ J. Brennar [Illegible]

⁽¹⁾ Specifically describe property.

⁽²⁾ Name(s) of Defendant(s).

⁽³⁾ Name(s) of Plaintiff(s).

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS

v

AMERICO V. CORTESE, ET AL., DEFENDANTS

MOTION-Filed September 18, 1970

Pursuant to 28 U.S.C. § 2284 and Rule 65(b), Fed. R. Civ. P., and based upon the verified complaint within, plaintiffs move the Court for a temporary restraining order enjoining defendants Lennox and Cortese from further issuance and execution of writs of replevin with bond until a three judge district court can be convened and a hearing held.

- 1. Named plaintiffs have all had property seized by defendant Lennox on the authority of writs of replevin with bond issued by defendant Cortese which had previously been filed by the other named and the class defendants.
- 2. In each case the respective named plaintiffs received no notice of the action taken against them prior to the arrival of a deputy sheriff armed with a writ of replevin with bond at their homes.

3. In none of these cases have the respective named plaintiffs received complaints or other documents explaining the nature of the actions taken against them.

4. All class plaintiffs are subject to similar deprivations through seizure by defendant Lennox on writs of replevin issued by defendant Cortese at the request of the other named and the class defendants.

5. The statutes and rules which provide for the seizure and removal of the property of plaintiffs by writs of replevin and the actions of defendants pursuant to

them subject plaintiffs to unreasonable searches and seizures in violation of the Fourth Amendment of the United States Constitution. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); and Laprease v. Raymours Furniture Company, Inc., C.A. No. 70-CU-16 (N.D. N.Y., July 30,

1970) (three judge court)

6. The statutes and rules which provide for the seizure and removal of the property of the plaintiffs by writs of replevin with bond and the actions of defendants pursuant to them deprive plaintiffs of their property without notice or hearing in violation of the Fourteenth Amendment to the United States Constitution. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Laprease v. Raymours Furniture Co., Inc.,

supra.

7. The statutes and rules which provide for the seizure and removal of the property of plaintiffs by writs of replevin with bond and the actions of defendants pursuant to them, requiring plaintiffs to post counterbonds of double the value of the property replevied to recover that property, in effect deny low-income individuals access to the Courts and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Harper v. Virginia Board of Electors, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1965); and Edwards v. California, 314 U.S. 360 (1941).

8. A complaint need not be filed at the time of the execution of the writ and the seizure of the property, and plaintiffs need not be provided, even at this point, with any notice of the nature of the claim against them.

9. Plaintiffs are required to file any counterclaims or petition for an order to impound within seventy-two (72) hours of the seizure, Pa. R. Civ. P. 1076, but they are given no notice of such a requirement.

10. Unless restrained defendants will continue to deprive plaintiffs of their constitutionally guaranteed

rights.

11. Such continued deprivation will subject plaintiffs to immediate and irreparable harm in that plaintiffs will be subject to unreasonable searches and seizures and to the deprivation of the use of their property without due

process of law.

12. This need for preserving the status quo in order to prevent immediate and irreparable harm to plaintiffs provides the necessary basis for the granting by this court of a temporary restraining order on behalf of all plaintiffs. United States v. United Mine Workers, 330 U.S. 258 (1947); Houghton v. Meyer, 208 U.S. 149 (1908).

Respectfully submitted,

/s/ Joel G. Weisberg

/s/ David A. Scholl

/s/ Harold I. Goodman

/s/ Peter W. Brown

/s/ Harvey N. Schmidt

Attorneys for Plaintiffs Community Legal Services, Inc. 313 South Juniper Street Philadelphia, Pennsylvania 19107

Civil Action No. 70-2592
[File Endorsement Omitted]
MITCHELL EPPS, ET AL., PLAINTIFFS

AMERICO V. CORTESE, ET AL., DEFENDANTS

MOTION-Filed September 18, 1970

Plaintiffs herewith move the Court based upon the verified complaint within:

1. To convene a three judge District Court pursuant

to 28 U.S.C. §§ 2281 and 2284.

2. Upon hearing, preliminarily to enjoin derendant Lennox from executing upon writs of replevin with bond pursuant to the Acts of 1705, 1 Sm. L. 44, § 12, 12 P.S. § 1821, and April 19, 1901, P.L. 88, as amended, 12 P.S. §§ 1824 to 1845 and pursuant to Pennsylvania Rules of Civil Procedure 1071 to 1087, and from seizing and removing personal property on the authorization thereof.

3. Upon hearing, preliminarily to enjoin defendant Cortese from issuing writs of replevin with bond pursuant to the Acts of 1705, 1 Sm. L. 44, § 12, 12 P.S. § 1821, and April 19, 1901, P.S. 88 as amended, 12 P.S. §§ 1824 to 1845 and pursuant to Pennsylvania Rules of

Civil Procedure 1071 to 1087.

Respectfully submitted,

/s/ Joel G. Weisberg
DAVID A. SCHOLL

/s/ Harold I. Goodman

/s/ Peter W. Brown

/s/ Harvey N. Schmidt
Attorneys for Plaintiffs
Community Legal Services
313 South Juniper Street
Phila., Pa.

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all other similarly situated, PLAINTIFFS

v.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, 288 City Hall, Philadelphia, Pennsylvania; and WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, Third Floor, City Hall, Philadelphia, Pennsylvania; LEWIS WASHINGTON, 4228 W. Girard Avenue, Philadelphia, Pennsylvania; Government Employees Exchange Corp., Kaign Avenue and Crescent Blvd., Pennsauken, New Jersey; and Sears, Roebuck and Company, Adams and Whitaker Avenues, Philadelphia, Pennsylvania; on behalf of themselves and all others similarly situated, Defendants

ORDER-Filed September 29, 1970

WHEREAS, in this action it appears by verified complaint that a temporary restraining order preliminary to hearing upon notice for a preliminary injunction should issue because immediate and irreparable injury, loss and damage will result to plaintiffs before a three judge district court can be convened and hear plaintiffs' motion for a preliminary injunction;

Now, therefore, on motion of plaintiffs.

It is ORDERED that:

(e) The property of plaintiff Rosa Bell Washington seized by defendant Lennox on a writ of replevin with bond ordered by defendant Lewis Washington, be returned to plaintiff Washington forthwith.

Issued at 7:45 o'clock p.m. this 18th day of 1970.

Civil Action No. 70-2592

MITCHELL EPPS, ET AL., PLAINTIFFS

vs.

AMERICO V. CORTESE, ESQ., ET AL., DEFENDANTS

Before Hon. E. MAC TROUTMAN, J.

Reading, Pa., September 25, 1970

[fol. 2] THE COURT: This is the matter of Mitchell Epps, et al., vs. Cortese, et al., Civil Action No. 70-2592, as to which this Court entered a temporary restraining

order on September 18th, 1970.

Let the record show that the Court has been in touch with counsel for the plaintiffs, Mr. Joel Weisberg, Esq., who has been advised that Mr. Lewis Washington of Philadelphia has appeared before the Court in connection with the temporary restraining order issued on September 18, 1970.

That order directed William M. Lennox, Sheriff of Philadelphia County, to return to the plaintiff, Rosa Belle Andrews Washington, certain property seized and in the possession of the sheriff by reason of a writ of replevin. Mr. Weisberg has advised that he has no objection to the Court proceeding to hear the testimony of Mr. Lewis Washington, defendant, and for that purpose Mr. Washington will be sworn as a witness at this time.

LEWIS WASHINGTON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q Now, what is your name, sir? [fol. 3] A Lewis Washington.

Q And you reside at 4228 West Girard Avenue, Philadelphia, Pennsylvania?

A I do. Your Honor.

Q And you are one of the defendants in Civil Action No. 70-2592?

A I am.

Q And you are here by reason of a temporary restraining order entered by this Court on September 18, 1970, at 7:45 p.m., is that correct?

A Yes, sir, Your Honor.

Q That order directed the Sheriff of Philadelphia County to return to the plaintiff, Rosa Belle Andrews Washington, certain property therein more specifically described, and it is by reason of the service of that order that you have appeared before the Court today, is that correct?

A Yes, sir, Your Honor.

Q Now, paragraph 34 of that complaint relating particularly to the plaintiff, Rosa Belle Andrews Washington, alleged that the said Rosa Belle Andrews Washington had filed for a divorce from her husband, Lewis Washington, and that she was on the day of the filing of the complaint, September 18, 1970, awaiting the approval of the Court. That allegation is contained in the [fol. 4] complaint, and it was so represented by counsel.

Mr. Washington, will you tell us whether that is cor-

rect?

A That is incorrect. I am the one that filed for the divorce, and the divorce was approved and signed by

the Judge September 2, 1970.

Q And you have handed to me a certified copy of a decree in course captioned Lewis Washington vs. Rosa B. Washington, February Term 1970, No. 4151, is that correct?

A Yes, sir, Your Honor.

Q And that is duly certified by the Prothonotary and established that a decree of divorce was signed by Judge Dwyer on September 2, 1970, is that correct?

A Yes, sir, Your Honor, correct.

THE COURT: We will have the decree in question marked as an exhibit and made a part of the record.

(Decree of divorce dated September 2, 1970, February Term, 1970, No. 4151, was marked Exhibit D-1.)

BY THE COURT:

Q So that the allegation contained in the complaint and the representations of counsel to the effect that your wife had sued you for divorce and that the matter was then, on September 18th, pending, is an incorrect allegation?

A Yes, sir, it is untrue.

[fol. 5] Q Now, Mr. Washington, paragraph 35 of the complaint alleges that the plaintiff, your wife, was on September 18, the date of the signing of the Court's order, living with her two children, a girl four years of age, and a boy 11 years of age in her home at 5343 Delancey Street, Philadelphia. Is that a correct statement?

A That is not true. The boy, Lewis Washington, Jr., 11 years old, is living with me at 4228 West Girard Avenue. Was at that time and still is.

Q Living with you? A Living with me.

Q And on September 18, the date of the filing of the complaint and the filing of the Court's order, the boy in question was living with you?

A Yes, sir, he was, Your Honor.

Q The property in question which was seized pursuant to a writ of replevin, consisting of a folding bed, a mahogany dresser, a pool table, a two-wheel bicycle, pinball machine, and desk with lamp, was property used by whom?

A Lewis Washington, Jr., my son.

Q And who is the owner of that property?

A I am the owner.

Q Did the sheriff seize any boys' clothes?

A No. My wife has the boys' clothes. [fol. 6] Q Does the white dresser and the metal cabinet for clothes relate to your son, or is that-

That is my daughter's.

Q That is used by the daughter?

A By the daughter. Q Then except for those two items, the white dresser and the meal cabinet for clothes, all other items are used by your son?

A By my son, yes.

Q And those items were and are now owned by you?

Yes, sir, Your Honor. A

Was it by reason of this ownership that a writ issued?

A Yes, sir, that is why it was issued, yes, sir.

THE COURT: It now appears to the Court that the representations upon which the temporary restraining order of September 18, 1970, issued were incorrect, both as to allegations contained in the complaint and representations made by counsel. Accordingly, we will vacate the order of September 18, 1970.

This hearing is adjourned. Court is adjourned until

10:00 o'clock Monday morning.

Reported by:

SAMUEL M. BLUMBERG, JR.

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL.

vs.

AMERICO V. CORTESE, ESQ., ET AL.

ORDER-Filed September 29, 1970

And now, this 25th day of September, 1970, IT IS ORDERED that the order of this Court dated the 18th day of September 1970 be and the same is hereby VACATED.

/s/ E. Mac Troutman J.

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated, PLAINTIFFS

12.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, 288 City Hall, Philadelphia, Pa.; and WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, Third Floor, City Hall, Philadelphia, Pa.; LEWIS WASHINGTON, 4228 W. Girard Avenue, Philadelphia, Pa.; GOVERNMENT EXCHANGE CORP., Kaign Avenue and Crescent Blvd., Pennsauken, New Jersey; and Sears, Roebuck and Company, Adams and Whitaker Avenues, Philadelphia, Pennsylvania; on behalf of themselves and all others similarly situated, DEFENDANTS

ORDER CONSTITUTING A THREE-JUDGE COURT— Filed October 5, 1970

Pursuant to the provisions of Section 2284, Title 28, United States Code, I designate Honorable J. Cullen Ganey, United States Circuit Judge, and Honorable John B. Hannum, United States District Judge, to sit with Honorable E. Mac Troutman, United States District Judge, as members of the Court for the hearing and determination of the above entitled case.

/s/ William H. Hastie Chief Judge Third Judicial Circuit

Dated: October 2, 1970

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS

v.

AMERICO V. CORTESE, ET AL., DEFENDANTS

DEFENDANT, GOVERNMENT EMPLOYEES EXCHANGE COR-PORATION'S ANSWER TO PLAINTIFFS' COMPLAINT— Filed October 9, 1970

FIRST DEFENSE

Defendant admits the allegations contained in paragraphs 8, 9, 11-14, 16; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 20-23, 25-41 of the Complaint; and denies each and every other allegation contained in the Complaint. Paragraph 4(d) is specifically denied as plaintiffs have failed to properly designate the class plaintiffs in accordance with the Federal rules and similarly 6(f) is denied as to class defendants.

SECOND DEFENSE

The Complaint fails to state a cause of action against defendant upon which relief can be granted.

THIRD DEFENSE

The count lacks jurisdiction as the action deals solely with property rights.

FOURTH DEFENSE

Plaintiffs have failed to properly designate the class action in accordance with the Federal rules of Civil Procedure as to plaintiffs and defendants.

FIFTH DEFENSE

Plaintiff, MITCHELL R. EPPS, has failed to join his wife, JACQUELINE EPPS, an indispensible party.

SIXTH DEFENSE

Plaintiff, EPPS, agreed in writing that defendant would retain ownership of the subject matter of the replevin action and therefore he has waived his rights to allege personal ownership.

SEVENTH DEFENSE

The validity of the Pennsylvania Replevin Statute and applicable Civil Procedural Rules should first be tested in the State Court.

COUNTERCLAIM

Defendant, GOVERNMENT EMPLOYEES EX-CHANGE CORPORATION, claims of the Plaintiff, MITCHELL R. EPPS, upon the following:

1. The Court having jurisdiction in this matter, no

further allegations are required.

2. Defendant, GOVERNMENT EMPLOYEES EX-CHANGE CORPORATION, is a New Jersey corporation engaged in the sale of consumer goods.

3. Plaintiff, MITCHELL R. EPPS, is an individual.

4. On the dates mentioned, of the kind and price, and in the amounts set forth in Exhibit "A" hereto attached and made a part hereof, which is a true and correct copy of the books of original entry of the defendant, the plaintiff purchased the merchandise set forth or referred to therein and agreed to pay therefor.

5. The said merchandise set forth in Exhibit "A" was ordered at the specific instance and request of the plaintiff, to whom the same was delivered and received with-

out complaint.

6. The prices charged are the fair, reasonable, just and market prices of the merchandise set forth and are the prices which the plaintiff agreed to pay therefor.

7. Pursuant to a Writ of Replevin issued by the defendant, its men and two deputy Sheriffs, peaceably and without force were voluntarily admitted to plaintiff EPPS' home, whereupon plaintiff voluntarily pointed out the whereabouts of the stereo, but indicated that he was not in possession of the remaining articles to be replevied.

8. Plaintiff is entitled to a credit of \$450.00 representing the value of the replevied stereo set. All other credits, if any, to which the plaintiff is entitled, is set

forth in the said Exhibit "A".

9. Plaintiff was in default in the payment of his monthly installments of \$33.25 on the revolving charge account to the extent of \$311.25 as of August 9, 1970, and as a result, defendant declared the entire sum due in accordance with the terms of defendant's Exhibit "A".

10. The defendant has made demand upon the plaintiff for payment for the said merchandise in the amount of \$2,017.26, but the plaintiff has failed and refused and still refuses to pay the said sum or any part thereof.

11. Plaintiff, in accordance with Exhibit "A", attached hereto and made a part hereof, has agreed to charges of 20% as an attorney's collection fee, totaling

\$403,44.

WHEREFORE, defendant, GOVERNMENT EM-PLOYEES EXCHANGE CORPORATION, respectfully prays for judgment against the plaintiff, MITCHELL R. EPPS, in the sum of \$2,420.70.

SHESTACK, HERMAN & BAYER

By: /s/ Ronald Jay Bayer Attorneys for Defendant Government Employees Exchange Corporation



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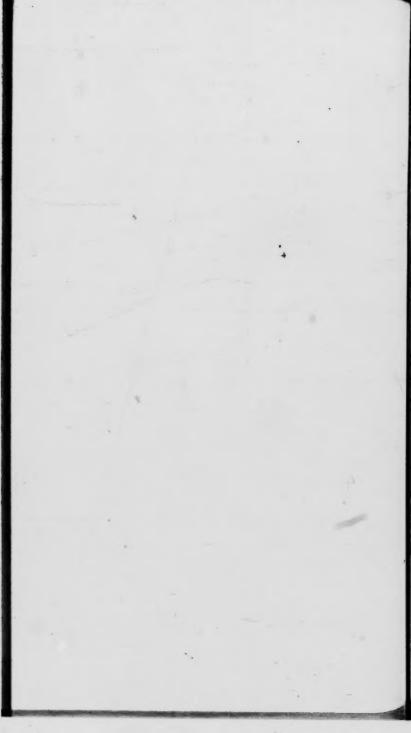
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Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all other similarly situated, PLAINTIFFS

v.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County; William M. Lennox, individually and as Sheriff of Philadelphia County; Lewis Washington; Government Employees Exchange Corp.; Sears, Roebuck and Co., Defendants

ANSWER TO COMPLAINT FILED BY SEARS, ROEBUCK AND Co.—Filed October 13, 1970

1. Denied. The Statutes of Pennsylvania provide for the replevin of personal property solely from defendants who are not in lawful possession thereof but are in fact holding the same unlawfully and in violation of the rights of the replevying party. The plaintiffs, Paul Parham and Ellen Parham, who are the only plaintiffs with whom the defendant, Sears, Roebuck and Co., is concerned, had neither ownership nor any lawful right to possession in the replevied goods at the time the replevin occurred. The plaintiff, Ellen Parham, had and at no time known to defendant, claimed any right or even any color of right in the replevied goods until the complaint in this action was filed. The plaintiff, Paul Parham, had agreed in writing that the defendant, Sears, Roebuck and Co., owned the goods. In addition, he had agreed in writing that the defendant had the right to immediate possession thereof in the event that he defaulted on certain obligations which he assumed in consideration of being granted a conditional right to possession thereof (see Exhibit A which is attached hereto and made a part hereof). The plaintiff, Paul Parham, knew that he had failed to comply with the said obligations, had been given a number of notices of his default, and had likewise been notified orally and in writing on numerous occasions that the defendant claimed lawful possession of the said goods and requested their return. The plaintiff likewise received a mailgram (letter) which was sent him on August 19, 1970, that the defendant was instituting an action to repossess the goods to which it had both title and the right to immediate possession (see Exhibit B attached and made a part hereof). The said agreement shown in Exhibit A complied fully with the Uniform Commercial Code as enacted in forty-nine States on the basis of serious studies and consultations by legal scholars, practicing lawyers, and other experts on commercial and credit matters, and with the credit regulations of the State of Pennsylvania. As to the class of unnamed plaintiffs contended for, the class insofar as the defendant, Sears, Roebuck and Co. is concerned, must, therefore, consist of plaintiffs who do not own and have no right to possession of the goods replevied. Further, the class can only extend to individual natural persons, not in business, and only personal property used for personal use, commonly known as "consumer goods", as defined in the Uniform Commercial Code.

2. Denied. The plaintiffs, Parham, who are the only plaintiffs with whom Sears, Roebuck and Co., is concerned had no rights, privileges or immunities relating to the goods replevied at the time the replevin was made. The defendant had in fact been denied its property rights, privileges and immunities in violation of both state, federal and constitutional law by the plaintiffs,

Parham.

3. Denied as stated. Plaintiffs, Parham, have no adequate remedy at law solely because they have no substantive rights. If they did have any substantive rights, which contention is not only denied but is not sustainable because of the admissions in the complaint, they have adequate remedies under the statutes of the Commonwealth of Pennsylvania.

4. (a), (b) and (c) It is admitted that the named parties are plaintiffs in this action, but only two of them, those named in Paragraph 4(b) are plaintiffs against the defendant, Sears, Roebuck and Co., and one of those, namely Ellen Parham, has no right or even color of right to the replevied property, nor any connection with Sears, Roebuck and Co. whatsoever.

(d) As pleaded in Paragraph 1 of the Answer, the class of plaintiffs insofar as Sears, Roebuck and Co. is concerned must be limited to those persons who have no ownership and no right to possession in the goods replevied, and cannot include the broad class for which the plaintiffs contend, and must be subject to the other restrictions mentioned in the said paragraph of the answer.

5. Denied. The named plaintiffs, so far as Sears, Roebuck and Co. is concerned, can only represent persons against whom a replevin is instituted, who have no right of ownership or possession in the goods replevied and as further restated in Paragraph 1 of the Answer.

6. (a), (b), (c), (d) and (e) Sears, Roebuck and Co. admits the allegations of Paragraph 6(e) and is not required to answer the allegations of the other subpara-

graphs.

(f) The Defendant, Sears, Roebuck and Co., denies this allegation. It is not qualified in any way to represent fairly and adequately all persons who have instituted actions of replevin. Replevin is but a procedure to protect the rights of numerous persons having very different substantive rights. It has, for instance, been used since 1705 (the date of the original enactment) to prevent irreparable harm to the owners of personal property where there is a danger of the said personal property disappearing or being severely damaged, to recover stolen goods, to prevent the removal of extremely mobile personal property by persons having no right thereto. It is used and has been used by corporations, banks, finance companies, automobile dealers, etc., and the United States Government, itself, to protect themselves against the depredations of persons having no right whatsoever to the goods replevied. The right existed at the time of the Constitutional Convention and was being exercised

even as that Convention sat in Independence Hall in this very Commonwealth. To say that Sears, Roebuck and Co. can adequately defend an ancient right which has been exercised for more than two hundred and sixty-five years by persons having many varying rights under the substantive law, rights which may be destroyed forever, as a practical matter, if the action of replevin is de-clared illegal, is to impose an obligation upon Sears, Roebuck and Co. which cannot be sustained by any individual defendant. By the Fifth Amendment, the federal government is forbidden to deprive any person of life, liberty or property, without due process of law. This obviously applies to the federal courts as well as to the executive and legislature. The Court in this case must, therefore, seriously and conscientiously consider whether by a sweeping decision that the ancient right of replevin (often used in cases where no other remedy is practicable) is illegal, they are not depriving as a practical matter persons whom they have never considered of the only practical means they have to protect their constitutional rights. The matters in which replevin may be used as a merely procedural remedy involve a wide spectrum of substantive rights. All of these must be considered be-fore giving a broad, sweeping decision, but in fact, any decision, to be reasonable and just, must be narrowed to those cases which the court has actually considered. Unless the court action is clearly narrowed to certain specific cases so far as substantive rights are concerned, Sears, Roebuck and Co., nor any other defendant, cannot adequately defend the interests of all parties who may institute replevin.

7. Denied. Neither the statutes nor the rules provide for seizure of property which is held in peaceful possession. They provide only for seizure where the possession of the party against whom replevin is instituted is in violation of the law and of the rights of the replevying party. Again in the specific case in which Sears, Roebuck and Co. is involved, there was agreement by the only plaintiff who has any right whatsoever to bring this action against Sears, Roebuck and Co., namely Paul Parham, that ownership and possession existed in Sears.

Roebuck and Co. at the time of the replevin and, therefore, that his possession of the goods at the time of re-plevin was in violation of his agreement, the laws of Pennsylvania and the rights of the defendant, Sears, Roebuck and Co., to be protected by such laws from the deprivation of its right to its property in accordance with the Fourteenth Amendment. If the State laws had not provided for the right of replevin in such a case, they would in effect be in violation of the Fourteenth Amendment, because they would not give a remedy under State law to the defendant to prevent as a practical matter the deprivation by the State of its right to its own property without due process of law. A right given by law that as a practical matter is non-existent, such as the recovery of a worthless judgment, is as much a violation of due process as is any action complained of by the plaintiffs who had no rights whatsoever in the instant case. This argument may, of course, apply with equal and indeed greater force to other replevying parties where a greater danger of loss of the property and any other meaningful remedy may exist. Again in the instant case involving the defendant, Sears, Roebuck and Co., there was notice and many notices as noted in Paragraph 1 hereof.

8 to 15. The Statutes of the Commonwealth of Pennsylvania and the Rules of Civil Procedure promulgated thereunder speak for themselves, and, therefore, no answer is required. It is noted, however, that no action of replevin with bond can be instituted without the approval of a bond by the county court having jurisdiction and the issuance of the writ by the court. It is further noted that the allegations of Paragraph 11 are not true in that the person served in a replevin action may without the filing of any bond demand that the plaintiff file a complaint, answer the same demanding possession of the goods and all damages arising from a wrongful replevin, and have the court order the repossession of the goods on his behalf together with all damages. (Assumpsit Rules applicable to Replevin and Rule 1085.) This right exists until the Plaintiff files a complaint and serves the same upon the Defendant and takes a default

judgment 20 days after such service or until, in the instant case, defendant complies with the applicable provisions of the UCC. The bond filed by the plaintiff is, of course, for the protection of the defendant's rights and if the bond is inadequate, the defendant can again petition the court and without filing a counterbond ask for an adjustment of the bond filed by the plaintiff. In addition to the amount of the bond which would be forfeit in the case of an improper replevin, the plaintiff is also personally liable for the damages sustained, the return of or, if that is impossible, the value of the goods as determined by the court. (Rule 1084-5). It is likewise noted that Paragraph 11 incorrectly states the case of Parham vs. Sears, Roebuck and Co. in that the plaintiff, Parham, at the time of the replevin, had neither the right of ownership of the articles replevied nor any right to possession thereof. He had notice that an action to repossess was being instituted and knew that the action concerned goods concerning which he had agreed that ownership was in the defendant and knew that the right to possession had vested in the defendant because of his defaults on obligations he had assumed. Such property could obviously not be immune or exempted from the right of replevin, and, therefore, the allegations of Paragraph 14 cannot apply to the Parham case. In addition to all his rights under the replevin statute and rules, plaintiff also had his rights under the Uniform Commercial Code since the replevin was based on the provisions of that statute and was merely a seizure of goods in accordance with the terms of that statute, the replevin being used solely because the defendant had refused to honor voluntarily the rights of possession and title of the defendant.

15. The allegations of Paragraph 15 do not apply to the plaintiff, Parham, because of the fact that he knew that he had no right to possession or title, had been warned of the imminent institution of the action, had known of the previous requests as to yielding possession. The Writ attached to the Complaint speaks for itself and clearly indicates that an action of replevin had been

instituted against him and that he was required to defend the same.

16. to 25. No action is required since all of these

paragraphs refer to other defendants.

26. Paragraph 26 is denied as stated. The plaintiff, Paul Parham, named in Paragraph 26 and defendant did enter into a certain transaction whereby possession of the said goods was delivered to the plaintiff subject to a security interest and agreement under the Uniform Commercial Code of Pennsylvania whereby, inter alia, title to the goods remained in the defendant, and the option to repossess the merchandise upon plaintiff's default in any of the terms of the agreement was given to the defendant by the plaintiff. A true copy of said agreement is attached hereto and made a part hereof as Exhibit A. The plaintiff, Ellen Parham, was not subject to the said transaction.

27. It is admitted that plaintiff Parham did make payments up to and including December 1969. Thereafter, however, he failed to make various payments on the obligation as they fell due each month and continued throughout the period from January to the date of the replevin in default under the obligation. He did, during the said period, make payments of \$83.00 (Eighty-Three Dollars) so that at the time of the replevin there was due and owing the sum of \$154.47 (One Hundred Fifty-

Four Dollars Forty-Seven Cents).

28. It is admitted as stated in Paragraph 27 of this Answer that certain payments were made by plaintiff.

29. Denied as stated. The plaintiff was warned personally, by telephone and by mailgram (letter) that repossession action was under way or authorized and that he should contact the defendant if he wished to discuss the matter further. On the 13th of March, 1970 Sears was informed by the plaintiff's wife that it should come out and repossess the merchandise and Sears sent a representative to do so. When such representative arrived, he was denied access to the merchandise. There was another later attempt under a voluntary agreement but this did not succeed either.

30., 31. The allegations in these two paragraphs are admitted except that defendant has no knowledge as to the alleged statements of the sheriffs that they had a right to seize the goods "forcibly" and demands proof thereof, if material. The taking of the goods from the premises involved no breach of the peace and no break-

ing or entering.

32. Denied for the reasons pleaded in the preceding paragraphs and further denied due to the fact that by security agreement executed in accordance with the authority of both the Goods and Services Installment Sales Act and the Uniform Commercial Code of Pennsylvania, the title to the property was vested in the defendant to whom plaintiff had given a right of repossession in the case of default. The plaintiffs have admitted in paragraphs 27 and 28 of the Complaint that such default did exist and does exist on their part so that at the time of the pleading the right to repossess the property still titled in its name was in defendant. Prior to the issuance of the writ of replevin defendant had made several attempts to exercise its contractual and statutory right to possess peacefully as allowed by the Uniform Commercial Code, but plaintiff had refused to allow defendant to exercise such rights. Only after such rights were denied to defendant did defendant institute the writ of replevin in accordance with its contractual and statutory rights under the Uniform Commercial Code and the security agreement.

33. Defendant is without knowledge or information as to the said allegation and, therefore, demands proof of the same, if material. It is noted, however, that under Pennsylvania law no counterbond is required of plaintiff, Parham, to reclaim the property, but instead plaintiff may defend the replevin action without a counterbond and, if successful, obtain judgment of possession over the property or the value thereof and damages for the taking and retention. (Pa. Rule C.P. 1084, 1085 Rules of Assumpsit applying to Replevin). Further, he can force the replevying party to put up greater security and gain without filing a counterbond himself. These rights exist until the plaintiff in the replevin action files

a complaint, serves the defendant and files a default judgment 20 days after such service or proceeds in accordance with the provisions of the Uniform Commercial Code.

34. to 41. The allegations of these paragraphs concern a plaintiff having no connection with Sears, Roebuck and Co. and, therefore, are neither admitted nor denied.

42. The prayer of Paragraph 42 is entirely too broad

- in that it attempts to have declared unconstitutional not only the Pennsylvania action of replevin with bond but also the Pennsylvania action of replevin without bond. The latter action provides for the service of a complaint upon the defendants prior to any actual seizure of the goods and does not provide for seizure of the goods until there has either been a hearing on the merits and judgment against the defendant or the defendant has failed to answer the complaint and default judgment has been entered against him. The attempt to declare the entire statute unconstitutional without a careful examination of each and every provision thereof would not only be beyond the jurisdiction of the court but entirely unjust in a situation where so many varying rights of creditors and debtors are concerned. This is especially true in view of the fact that the action of replevin has existed throughout the entire constitutional history of the United States and that the rights and equities between innumerable creditors and debtors may be affected by any decision in this matter.
- (a) The plaintiff's statements in Paragraph 42 (a) are not correct in that the Sheriff was acting under a Writ issued by a County Court, Commonwealth of Pennsylvania and in accordance with the Statutes and Rules of Civil Procedure thereof. Further, the defendant and the Sheriff were acting in accordance with the rights granted to the defendant under the Uniform Commercial Code of Pennsylvania. The property being replevied was owned by the defendant and the defendant had the immediate right to possession thereof, which right to possession had been and was being denied by the plaintiff in spite of the fact that he had agreed that the defendant had such rights to title and possession.



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Further, the defendant had on a number of occasions requested that the plaintiff honor his obligations in relation to the debt owed and in relation to the property rights of the defendant. The use of replevin in this case was merely a procedural remedy necessary to enforce the defendant's property rights under the laws of Pennsylvania and under the laws of the United States and the Constitution thereof.

(b) Paragraph 42(b) is denied because in the Parham case the plaintiff, Parham, had neither ownership of the goods replevied nor did he have any rights to the goods. Instead, he had violated the rights of the defendant as to the said property. The Replevin Laws and Rules of the Commonwealth of Pennsylvania do not provide for the taking of property from individuals who are entitled thereto, but instead provide solely for the said action in cases where the defendant in the replevin action has no right to title or possession of the goods replevied. They further provide for damages and the return of goods to any person who may be improperly denied thereof and such remedies are available without the necessity of filing any counterbond.

(c) Paragraph 42(c) is denied because as stated previously in this Answer there is no necessity for the party against whom a replevin is had to file a counterbond in order to reclaim the goods and obtain damages for their taking and retention. Such right to recover the goods, etc., exists until the replevying party files a Complaint, serves the same upon the party from whom the goods have been taken and enters a default judgment if no Answer is filed within 20 days of such serv-

ice.

WHEREFORE, defendant respectfully prays that:

(1) Any relief granted plaintiffs be limited to the action of replevin with bond, and not affect the action of replevin without bond, where no taking can occur without notice and opportunity to be heard.

(2) The prayers of the complaint be denied.

(3) Since plaintiff had admitted in his Complaint that he is in default under the security agreement exe-

cuted by him and was so at the time of the replevin, and since he had no right to possession of the replevined goods and no title therein and was in fact violating defendant's rights to possession, the Court should enter judgment on the pleadings or summary judgment against the plaintiff, Parham, and in favor of the defendant,

Sears, Roebuck and Co.

(4) The Court deny the petition of the plaintiff to make this a class action or strictly limit the class to parties in precisely the same situation as the plaintiff, Parham, since the allowance of a broad and not clearly defined class of plaintiffs might cause serious injustice to numerous parties not of record who have used and may use the procedural right of replevin to protect essential rights they possess under the substance of law

of the Commonwealth and the United States.

(5) The Court deny the prayer of the Complaint that Sears, Roebuck and Co. is qualified to represent as a class all of the numerous persons and entities in the Commonwealth who may at varying times have used the right of replevin. As stated in Paragraph 6(f), the right of replevin is purely procedural and may be necessary in numerous different situations to protect the rights given under numerous different statutes and the common law. It is impossible for Sears, Roebuck and Co. to defend this action except against the plaintiff, Parham, and persons who are in precisely his situation against whom the right of replevin may be used. The class of plaintiffs and defendants, if viable at all, must, therefore, be strictly eliminated to avoid possible and indeed probable injustice to many persons not of record.

- /s/ Robert F. Maxwell ROBERT F. MAXWELL
- /s/ Harry L. Devoe HARRY L. DEVOE Attorneys for Sears, Roebuck and Co.



Ехнівіт А

(1)	CREDIT BILLING COPY SHARS, ROEBUCK A	ND CO.	3026028
Sears	DIV. SALES NO. DATE	DELIVERY DATE	NO. OR NAME OF STORE CAREFRING ACCOUNT
ACCOUNT NUMBER NAME (PRINT)	Paul Parliam	AP	ONE 2 1401
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1	Ac # 3026027		
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TUIC IS BASE	PLEASE RETURN THIS CHECK IN CASE OF ERROR, RETURN OR EXCHANGE	SERVICE CHARGE	T X
THIS IS PART	DEFERRED	TIME SALE PRICE	XXXXXXX
OF	CREDIT TERMS CODE DATE	·	
A DRDER	EMPLOYE SALE		XXXXXI/
	MONTHLY		xxxxx
F2250 Au. REV.5/67 Patriced in U.S.A.	PAYMENTSDUE	TIME BALANCE XX	XXXXX

EXHIBIT A

COPY SEARS, ROEBUCK AN		302		7
Scars DIV. SALES NO. DATE	DELIVERY DATE	NS. OR N	STORE NO.	-
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RINTED IN U.S.A.			- 1111	<u> </u>

EASY PAYMENT ORDER This order is subject to the approval of the Credit Sales Dept. of Sears, Roebuck and Co. There are to be no agreements regarding it, other than those mentioned below or attached hereto in writing.

SECURITY AGRESMENT

months and a final payment All payments will be due on the same day of each month. The reverse side of this sheet constitutes a part of this will not sell, transfer possession of, remove, or encumber merchandise; (4) Upon one or more defaults in any terms of this agreement you may declare the entire balance due and payabla or you may, at your option, repossess the merchandise. A delinquency charge of five percent the price of such purchases; all charges and payments may be increased proportionately; and all terms and conditions of this contract shall be security under any subsequent contract until the time sale price under this contract is also price under this contract is fully paid. contract. Until such payment has been made, I agree that: (1) Title to merchandise remains in you; (2) I have risk of loss or damage; (3) ar (\$1.00)) may be assessed on each installment in default for ten days or more pay actual and reasonable costs of collection occasioned by removal of the goods from Pennsylvania without written permissio of Sears, by failure of Buyer to potify Sears of any change of residence, or by failure of Buyer to communicate with Sears for forty-five day effer default in any installment. If sobsequent purchases are added to this contract, the total price under this contract shall be increased I each month for SEARS, ROEBJCK AND CO.: 1 will Pay 5 16 22 but not more than (1.9 dollars (\$5.00) or less than one dol

THE SERVICE CHARGE HEREIN CONTAINED DOES NOT EXCEED THE EQUIVALENT OF FIFTEEN PERCENT SIMPLE INTEREST PER ANNUM ON THE UNPAID BALANCE, EXCEPT THAT A MINIMUM SERVICE CHARGE OF SEVENTY CENTS (704) PER MONTH MAY BE MADE.

NOTICE TO THE BUYER: (1), DO NOT SIGN THIS AGREEMENT BEFORE YOU READ IT, OR IF IT CONTAINS ANY ELAMK SPACE. (2), YOU ARE ENTITLED TO A COMPLETELY FILLED IN COPY OF THIS YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL CONDITIONS TO OBTAIN A PARTIAL REFUND OF THE SERVICE AMOUNT DUE AND UNDER CERTAIN AGREEMEN (8).

CHARGE.
RECEIPT OF SECURITY AGREEMENT AND A COPY OF THIS IS ACKNOWLEDGED. U at 1 Coll Sear, Resbuck and Ca. By Signature U.Q.

sats er any other above item that may be incomplete will be furnished within NOTE: A memorandum of the amount, number of -fifteen days.

F-2250 Po. Rev. 5/67

SEARS MAILGRAM

ATTRIPTS TO RESOLVE PAST DUE COMDITION OF YOUR ACCOUNT HAVE FAILED. LITIGATION PENDING TO PECLAIM OUR IMMCHANDISE.

CONTACT COLLECTION MANAGER DIFFEDIATELY.

FR. PAUL PARHAM 611 N.54TH ST.

Balance \$199.47 Past Due \$77.50

SEARS, ROEBUCK AND CO.

PHILA., PA.

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS

v.

AMERICO V. CORTESE, ET AL., DEFENDANTS

Answer to Motions for Preliminary Injunction—Filed October 13, 1970

1. The named plaintiffs have had certain goods replevied by the sheriff. As to class defendants the class, if any, is improperly defined in the complaint in such a manner that it may do serious injustice to many parties not connected with this action. Insofar as the defendant Sears, Roebuck and Co. is concerned it cannot represent class defendants for all of the reasons stated in the Answer to the Complaint nor can the named plaintiff Paul Parham properly represent all of the class plaintiff contends for. The class action must therefore either be completely disallowed or very strictly limited.

2. Denied as to the plaintiff Parham who is the only plaintiff with whom Sears, Roesbuck and Co. is concerned on the basis of the facts and reasons stated in

the Answer to the Complaint.

3. Denied because plaintiff Parham knew and had agreed that title to and possession of the replevied goods was in the defendant, Sears, Roebuck and Co. Further denied because the plaintiff Parham did receive a number of notices of the act of replevin to be instituted against him. The plaintiff Parham had also denied to the defendant its right of title and possession in the goods in violation of its right under the laws of the Commonwealth of Pennsylvania and the United States. This was the only reason he was given notice of the action to be taken in regards to the replevin and the only reason the replevin was made.

4. The class the plaintiff contends for is entirely improper as pleaded in Para. 1, 6 (f), 7 and Para. 42 of

the Answer to the Complaint.

5. The property taken by the sheriff in the Parham action did not belong to the plaintiff Parham nor did he have any right of possession thereof. The replevin was instituted solely because he persisted in violating the rights of title and possession of the defendant in spite of numerous requests that he cease to do so. The plaintiff Parham had agreed that the right of title in the property was in defendant and that the right of possession was likewise in defendant if he violated certain obligations which he undertook in the said written agreement. He did violate such obligations. He was again notified of such violations and nonetheless persisted in them. The taking of the property was therefore entirely reasonable and was the only means of protection that defendant had in such property in view of the refusal

of Parham to honor such rights.

6. The property replevied in the Parham case did not belong to plaintiff Parham nor did he have any right of possession therein. The statutes and rules do not provide for the seizure of property which a defendant in a replevin act owns nor in which he has the right of possession. Replevy is solely to recover property from defendants who have no rights therein. Since the decision of the U.S. Supreme Court in the Sniadach case, two Federal Courts have considered similar replevin statutes and in both cases held them entirely proper and constitutionally valid. These cases are Brunswick Corp. vs J. P. Inc., 424 Fed. 2nd 100, 105 (1970) (C.A. 10) and Fuentes vs Faircloth, a decision by a three judge federal court in the southern district of Florida. The latter case was decided on September 9, 1970. Both cases considered the Sniadach case and held it inapplicable to replevin. It is to be noted further that Justice Douglas in giving the Court's opinion in the Sniadach case laid great emphasis on the fact that the wages which had been garnisheed were a very peculiar sort of property and his decision was based in a large part, if not entirely, on this fact. Further Justice Douglas stated on Page 23 L. Ed. 2nd 352, 395, U. S. 339, that summary process may well meet the requirements of due process in certain situations. He then cited a number of cases where this was so, such cases referring to the seizure

of goods or property without prior notice or hearing. He further stated that an exception to the Sniadach decision would exist where a creditor is entitled to special protection. It is submitted that the exception mentioned by Justice Douglas in his opinion in Sniadach would include the situation here present where the replevied property was goods which the replevying party owned and in which it had an immediate right to possession by agreement with the party against whom the replevin was made. It is not the rights of the plaintiff Parham which were being violated at the time of the replevin but instead the rights of the defendant Sears, Roebuck and Co. Further, the decisions in Brunswick and Euentes hold that Sniadach is distinguishable from cases involving replevin (such as here) where a security interest has been agreed to by the person against whom the replevin is made, giving the secured party the right to title and immediate possession of the property.

7. The statutes and rules do not require a filing of counter bond, but instead the party against whom a replevin is had may regain possession and obtain damages for wrongful taking without the filing of any such bond. The procedure is explained at length in the Answer to the Complaint. The party against whom replevin is had has a substantial period of time to obtain such possession and obtain damages as is further explained in the Answer to the Complaint. Therefore the contention that low income individuals are denied access to the courts is simply not so under the laws of the Commonwealth of Pennsylvania regarding replevin. It is obvious by the filing of this action that the plaintiffs did have qualified legal representation available to avail themselves of the protective provisions of the Pennsyl-

vania laws.

8. The plaintiff Parham did have notice and knowledge of the rights of the defendant in the goods and had agreed thereto. He also had notice that the action was being instituted. This is set forth at length in the Answer.

9. The remedy of impounding the property is only one of many remedies given by the rules and is not nec-

essary for the purpose of reclaiming the goods, obtaining the value thereof, or obtaining damages for the taking. The various remedies available to the party against whom replevin is made are set forth in detail in the Answer as is the substantial time during which they may make such claims.

10. The plaintiffs were denied no constitutional rights. Further they have most adequate remedies in the replevin action which is at this moment still pending and such remedies exist whether they filed counter bond or

not.

11. The contention of the paragraph can obviously apply only to the alleged class plaintiffs. As averred both in the Answer to the Complaint and in this Answer, the class contended for is improper and if allowed may do substantial injustice to many persons not named in this suit.

12. There is no need for a temporary or permanent injunction nor is either justified under the law. The plaintiffs have adequate remedies at law which they could pursue in the state court proceedings which are still pending in accordance with the statutes and rules of Pennsylvania.

WHEREFORE, the defendant prays that no injunction of any sort be granted, and if granted, it be strictly limited to those portions of the statute relating to replevin with bond and strictly limited as to the class of persons affected thereby and that it have prospective effect only.

The defendant calls to the attention of the Court that because of the institution of this action, it is now limiting its replevin actions in Pennsylvania to replevins without bond. Such procedure does require notice and an opportunity to be heard before actual taking, the defendant has so acted, however, without any admission that the action of replevin with bond is unconstitutional.

Respectfully submitted,

/s/ Robert F. Maxwell

/s/ Harry L. Devoe

Attorneys for Sears, Roebuck and Co. Defendant

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County; Whiliam M. Lennox, individually and as Sheriff of Philadelphia County; Lewis Washington; Government Employees Exchange Corp.; Sears, Roebuck and Co., defendants

MOTION FOR SUMMARY JUDGMENT FILED BY SEARS, ROEBUCK AND CO.—Filed October 13, 1970

Defendant, Sears, Roebuck and Co., hereby moves the Court to enter Summary Judgment against the plaintiffs Paul Parham and Ellen Parham and in favor of Sears, Roebuck and Co. for the following reasons:

1. The only act complained of in the Complaint of the Parhoms is that they were wrongfully deprived of

possession of certain property.

- 2. Paragraphs 26, 27 and 28 of the Complaint admit that the property had been obtained by the plaintiffs from Sears, Roebuck and Co. and that they had defaulted on the payments due on said property to Sears, Roebuck and Co.
- 3. Paragraphs 26, 27 and 28 of the Answer to the Complaint filed by Sears, Roebuck and Co. likewise aver that there was such default. Further, such paragraphs make clear that the plaintiff, Ellen Parham, was not a party to the transaction between Sears and the plaintiff Paul Parham and therefore had and has no right in the property whatsoever. The said paragraphs of the An-

swer together with the Exhibit attached to the Answer make clear that the plaintiff, Paul Parham, did not own the goods replevied and that at the time of the replevin, had no right to possession thereof because of his violations of the terms of the security agreement he had executed in accordance with the provisions of the Uniform Commercial Code of Pennsylvania. At the time of the replevin and for sometime prior thereto (in fact as long ago as March 1970) he had been violating the rights of the defendant—owner of the goods—in its right to possession thereof. He had had notice of his defaults and had, on several occasions, been requested to yield possession of the said goods.

4. The essential factual contention on which the Prayers of the Complaint are based are that goods belonging to the plaintiff Parham and in which he had a right of lawful possession were taken from him. As stated above, the pleadings themselves show that at the time of the replevin and now he had no right of ownership or possession and was in fact violating the rights of the defendant to title and possession. Because the pleadings do show the said facts and because the facts cannot be denied by the plaintiff, the Court, as a matter of justice and equity, should issue immediate summary judgment

as prayed for herein.

/s/ Robert F. Maxwell

/s/ Harry L. Devoe, Jr.
Attorneys for Sears, Roebuck
and Co.

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS

vs.

AMERICO V. CORTESE, ET AL., DEFENDANTS

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT— Filed October 19, 1970

Pursuant to Rule 56 of the Federal Rules of Civil Procedure plaintiffs move the Court to enter Summary Judgment against all defendants and in favor of all plaintiffs, the record before the Court clearly indicating that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

Respectfully,

- /s/ Joel G. Weisberg JOEL G. WEISBERG
- /s/ David A. Scholl
 DAVID A. SCHOLL
- /s/ Harold I. Goodman HAROLD I. GOODMAN

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS vs.

AMERICO V. CORTESE, ET AL., DEFENDANTS

MOTION—Filed October 19, 1970

Pursuant to F.R.C.P. 12(b) plaintiffs move for the dismissal of defendant Government Employees Exchange Corporation's Counterclaim on the grounds that this Court lacks jurisdiction over the subject matter of that counterclaim.

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 solely for the purpose of determining the constitutionality of the acts and rules providing for replevin with bond, the merits of any creditor's claim is not here in issue and would not be affected by any determination of this Court.

WHEREFORE, plaintiffs pray that defendant Government Employees Exchange Corporation's Counterclaim be dismissed.

Respectfully submitted,

/s/ Joel G. Weisberg

/s/ David A. Scholl

/s/ Harold I. Goodman

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS

vs.

AMERICO V. CORTESE, ET AL., DEFENDANTS

MOTION-Filed October 19, 1970

Pursuant to 28 U.S.C. § 2284 and based upon the record before the Court, and for the reasons set forth in plaintiffs motion for a temporary restraining order, plaintiffs move the Court for a preliminary injunction restraining defendants Lennox and Cortese from further issuance and execution of writs of replevin with bond until such time as this Court may finally determine the merits of the claim before it.

Respectfully submitted,

- /s/ Joel G. Weisberg JOEL G. WEISBERG
- /s/ David A. Scholl DAVID A. SCHOLL
- /s/ Harold I. Goodman HAROLD I. GOODMAN

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated, PLAINTIFFS

vs.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, 288 City Hall, Philadelphia, Pennsylvania; and WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, Third Floor, City Hall, Philadelphia, Pennsylvania; LEWIS WASHINGTON, 4228 Girard Avenue, Philadelphia, Pennsylvania; GOVERNMENT EMPLOYEES EXCHANGE CORP., Kaign Avenue and Crescent Blvd., Pennsauken, New Jersey; and SEARS, ROEBUCK AND COMPANY, Adams and Whitaker Avenues, Philadelphia, Pennsylvania; on behalf of themselves and all others similarly situated, DEFENDANTS

DEFENDANTS' MOTION TO DISMISS COMPLAINT— Filed October 20, 1970

Defendants herein, AMERICO V. CORTESE, ES-QUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, and WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, by their attorneys, LEVY ANDERSON, City Solicitor of the City of Philadelphia, and HARRY WO-LOV, Deputy City Solicitor, file the within Motion to Dismiss Complaint in the above matter and allege as follows:

1. The Complaint fails to state a claim upon which relief may be granted.

CITY OF PHILADELPHIA LEVY ANDERSON City Solicitor

By: /s/ Harry Wolov Deputy City Solicitor

Civil Action No. 70-2592

[File Endorsement Omitted]

PAUL and ELLEN PARHAM, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

AMERICO V. CORTESE, ESQ., ET AL., DEFENDANTS

STIPULATION—Filed November 10, 1970

AND NOW, this 4th day of November, 1970, it is hereby stipulated by and between counsel for Plaintiffs and attorneys for the Defendant, Sears, Roebuck and Co., as follows:

- 1. On February 1, 1969 the Plaintiff, Paul Parham, and the Defendant, Sears, Roebuck and Co., did enter into a certain transaction, evidenced by Exhibit "A", which is attached hereto and made a part hereof. The Plaintiff, Ellen Parham, was not a party to the said transaction.
- 2. The goods listed in Exhibit "A" were delivered to the Plaintiff, Paul Parham, and retained by him in his home, 611 North 54th Street, Philadelphia, Pennsylvania, until they were replevied by the Sheriff of Philadelphia County as hereinafter explained. The Plaintiff, Ellen Parham, is the wife of the Plaintiff, Paul Parham, and lived at the same address at all times mentioned herein.

3. The agreement attached as Exhibit "A" complies with the provisions of the Uniform Commercial Code of Pennsylvania and the Goods and Services Installment

Sales Act of that State.

4. There is attached hereto and made a part hereof, as Exhibit "B", the payment record of the Plaintiff, Paul Parham, which shows that there were defaults on his part as to the agreement of February 1, 1969.

5. There were nine (9) telephone calls made by the Defendant or its representatives to the Plaintiff and there were five (5) written communications also sent, copies of which are attached and made a part hereof as Exhibits "C", "D", "E", "F" and "G", respectively. The dates on which such written communications were sent are respectively: May 16, 1970, May 22, 1970, June 22, 1970, July 22, 1970 and August 19, 1970. There were also two (2) personal visits to the home of the Plaintiff. All of these telephone calls, letters and visits concerned

the problem of the account and its status.

6. On September 11, 1970 a Writ of Replevin With Bond was issued by the Prothonotary of Philadelphia County, copy of the said Writ being attached hereto and made a part hereof, as Exhibit "H". This Writ was issued on behalf of the Defendant, Sears, Roebuck and Co., upon the filing by it with the Prothonotary of a bond as required by the Replevin Statute and Rules, an entry of appearance by the attorney acting for Sears, Roebuck and Co., and a praecipe for the issuance of the Writ. There was also filed with the Prothonotary an affidavit as to the value of the property on which the amount of the bond, which must be twice the value of the property, was determined. Copy of the Bond, as filed, is attached hereto and made a part hereof, as Exhibit "I". Copy of the Affidavit is part of Exhibit "H".

7. On September 15, 1970 the goods were removed from the Plaintiffs' home by the Office of the Sheriff of Philadelphia County in accordance with the command of the Writ issued by the Prothonotary and at the said time the original Writ was exhibited to the Plaintiff's wife, Ellen Parham, and a copy of the said Writ was left with her. There was no violence, no breaking and entering, and Ellen Parham admitted the Sheriff to the house for the purpose of executing the Replevin in ac-

cordance with the mandate of the Writ.

8. All of the actions taken by the Defendant, Sears, Roebuck and Co., were in accord with the Statutes and Rules relating to Replevin, the Uniform Commercial Code and the Goods and Services Installment Sales Act.

- 9. The Defendant, Sears, Roebuck and Co., has not filed a Complaint in the Replevin action and the Plaintiff, Paul Parham, has not requested them to do so, which he would have a right to do under the Replevin Rules and Statutes.
- 10. Prothonotary and Sheriff's dockets show numerous prior Replevin with Bond Actions instituted and executed upon since 1705.
- 11. Upon the filing of the requisite papers with the Prothonotary, the Prothonotary is required to issue the Writ. Upon delivery of the Writ issued by the Prothonotary, the Sheriff is required to execute the mandate of the Writ.
- 12. Neither the applicable Replevin With Bond Acts nor Rules expressly set forth that the Sheriff, pursuant to the Writ with Bond, may break and/or enter or that he may not break or enter.
- 13. The Sheriff or his agents, after seizing and taking possession of the property, must hold it for a period of seventy-two (72) hours, during which time the Defendant on the Writ may reclaim the property if he files a counterbond. The Defendant in the Replevin action may also move to have the original bond adjusted or may also demand a Complaint from the Plaintiff in the Replevin action (which Complaint must be filed within 20 days thereafter) and thus litigate the right to possession*and title and the question of any damages he may have sustained due to a wrongful seizure of his goods. The rights of the Defendant as to those remedies listed in the second sentence of this paragraph exist without the filing of a counterbond. If no counterbond is filed, the property will be delivered by the Sheriff to the Plaintiff on the Writ, who will retain possession thereof subject to the rights of the Defendant in the Replevin action during the course of the litigation.
- 14. It is understood that this action concerns only the action of Replevin With Bond and does not involve the action of Replevin Without Bond.

Plaintiffs' attorney stipulates to the facts contained herein but does not agree to their relevancy.

The Stipulations as to the law are solely for the purpose of attempting to guide the Court. The law, of course, must speak for itself.

- /s/ Joel G. Weisberg Attorney for Plaintiffs
- /s/ Robert F. Maxwell
 Attorney for Defendant,
 Sears, Roebuck and Co.

CREDIT BILLING 3026028 COPY SEARS, ROEBUCK AND CO. CLC FAA M.C.A. E.P. CO.D. CASH Sears DIV DATE DELIVERY DATE ACCOUNT NUMBER NAME APT. (PRINT) **ADDRESS** CITY : SHIPPING INSTRUCTIONS EXHIBIT "A" This purchase is made under my Sears Revolving Charge 283 TOTAL STORE Agreement for the credit sales price consisting of the above cash price plus the credit service charge. DEPOSIT Purchased By BALANCE SHIP VIA CASH SALE In stores on Floor Approval, on Easy STORE DEL. PARCEL Payment odd-on sales, complete DOWN XXXXXXX contract on reverse side of Credit TRUCK OTHER Billing copy and Customer copy. GASH SALE XXXXXXX PLEASE RETURN THIS CHECK IN CASE OF ERROR. SERVICE RETURN OR EXCHANGE. THIS IS PART DEFERRED TIME SALE XXXXXXX OF. CREDIT TERMS CODE DATE TIME BALANCE XXXXXX EMPLOYE SALE PART ORDER OLD TIME MONTHLY CONSOLIDATED

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EASY PAYATENT ORDER This order is subject to the approval of the Credit Sales Dapt, of Sears, Roebuch and Co. There are to be no agreements regarding it, other than those mentioned below or attached hereto in writing.

SECURITY AGRESMENT

All payments will be due on the same day of each month. The reverse side of this sheet constitutes a part of this will not sell, transfer possession of, remove, or encumber merchandise; (4) Upon one or more defaults in any terms of this agreement you quency charge of five percent but not more than five dollars (\$5.00) or less than one dollar (\$1.00)) may be assessed on each installment in default for ten days or more. Buyer shall pay actual and reasonable costs of collection occasioned by removal of the goods from Pennsylvania without written permission micate with Sears for forty-five days after default in any installment. If Subsequent purchases are added to this contract, the total price under this contract shall be increased by the price of such purchases; all charges and payments may be increased proportionately; and all terms and conditions of this contract shall nonths and a final payment Title to merchandise remains in you; (2) I have risk of loss or damage; (3) apply to all subsequent purchases. The goods purchased under this contract shall be security under any subsequent contract until the t of Sears, by failure of Buyer to notify Sears of any change of residence, or by failure of Buyer to comi your option, repossess the merchandi each month for 16:30 may declare the entire balance due and payable or you may, at contract. Until such payment has been made, I agree that: (1) SEARS, ROEBUCK AND CO.: 1 will Pay \$.

THE SERVICE CHARGE HEREIN CONTAINED DOES NOT EXCEED THE EQUIVALENT OF FIFTEEN PERCENT SIMPLE INTEREST PER ANNUM ON THE UNPAID BALANCE, EXCEPT THAT A MINIMUM SERVICE CHARGE OF SEVENTY CENTS (704) PER MONTH MAY BE MADE. ale price under this contract is fully paid.

ACCOUNT DUE AND UNDER CERTAIN CONDITIONS TO OBTAIN A PARTIAL REFUND OF THE SERVICE MOTICE TO THE BUYER: (1). DO NOT SIGN THIS AGR.:EMENT BEFORE YOU READ IT, OR IF IT CON-TAINS ANY BLANK SPACE. (2). YOU ARE ENTITLED TO A COMPLETELY FILLED IN COPY OF THIS AGREEMENT. (3). UNDER THE LAW, YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL

RECEIPT OF SECURITY AGREEMENT AND A COPY OF THIS IS ACKNOWLEDGED.

Signature ALL CALL CALL Sears, Roeduck and Co. By

ALL

Date Signa

ments or any other above item that may be incomplete will be furnished within NOTE: A memorandum of the amount, number of instr

-fifteen days.

F-2250 Pa. Rev. 5/67

rs "Sbop an

ut Sears and San

SEARS, ROEBUCK AND CO. 4640 Roosevelt Blvd. PHILADELPHIA, PA. 19132

PLEASE MENTION ACCOUNT NUMBER WHEN WRITING OR SENDING PAYMENT

Mr. Paul Parham 611 N. 54th St. Phila., Pa. 19131

DATE

					25		
BALANCE	237,47 237,47 237,47 237,47 237,47 204,47 199,47 154,47	* *		•			
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PAYMENT DATES SHOW WHEN PAYMENTS WERE RECEIVED BY SEARS

CONTACT COLLECTION MANAGER IMMEDIATELY TO PREVENT REPORTING YOUR DELINQUENT ACCOUNT TO LOCAL CREDIT BUREAUS.

MR. PAUL PARHAM

611 N.54TH ST.

PHILA., PA. 19131

SEARS, ROEBUCK AND CO. EXHIBIT "C"

ACCT. NO.4 31219 68850 1

BALANCE \$237.47 NOW DUE \$99.00 TELEPHONE JE 3 9966

1/22

SEARS MAILGRAM

WRIT HAS BEEN ISSUED DUE TO FAILURE TO RELEASE MERCHANDISE.

MR. PAUL PAPHAM

611 N.54тн Sт.

PHILA., PA. 1913

ACCT. #4 31219 68350

BALANCE \$237.47

PAST DUE \$82.50 TELEPHONE # JE 3 9966

PF24668 ESC

SEARS, ROEBUCK AND CO. EXHIBIT "D"

SEARS MAILGRAM

YOU HAVE TEN DAYS TO RESOLVE YOUR DELINQUENT ACCOUNT OR ATTORNEY ACTION.

MR. PAUL PARHAM

611 N.54TH ST.

PHILA., PA. 19131

COLLECTION MANAGER

TELEPHONE JE 3 9966

SEARS, ROEBUCK AND CO. EXHIBIT "E"

PF24553 E

DEAKO MAILGRAM

IMPORTANT YOU MAKE PAYMENT ON YOUR ACCOUNT WITHIN 24 HOURS.

CREDIT SALES DEPARTMENT

MR. PAUL PARHAM

611 N.54TH ST.
PHILA., PA. 19131

Telephone No. JE 3 9966 4 31219 68850 1 Balance \$199.47 Past Due \$61.00

PF24556

SEARS, ROEBUCK AND CO. EXHIBIT "F"

SEARS MAILGRAM

HAVE FAILED. LITICATION PENDING TO OUR PERCHANDISE. ATTEMPTS ACCOUNT H RECLAIM O

CONTACT COLLECTION PANAGER IFFEDIATELI.

FR. PAUL PARHAM

611 N.54TH ST

Past Due \$77.50 Balance \$199.4

SEARS, ROEBUCK AND CO.

19131

PA.

PHILA.,

EXHIBIT "G"

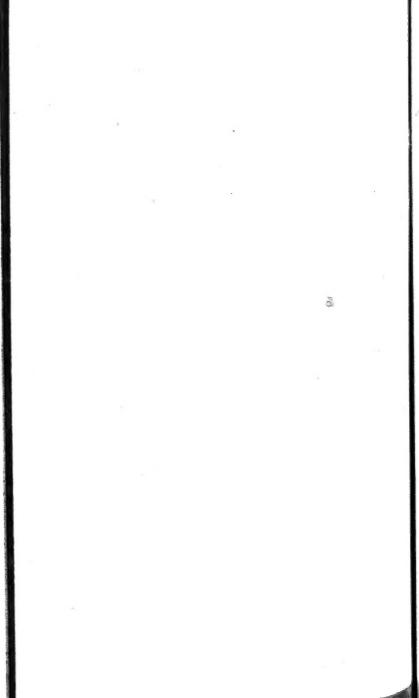


EXHIBIT "H"

Replevin With Bond

THE COMMONWEALTH OF PENNSYLVANIA COUNTY OF PHILADELPHIA

C. P.

COUNTY COURT SEPTEMBER TERM, 1970

No. 737

SEARS, ROEBUCK AND Co.

vs.

PAUL PARHAM, 611 North 54th St., Phila., Pa.

TO THE SHERIFF OF THE COUNTY OF PHILA-DELPHIA:

YOU ARE DIRECTED to replevy the following property $^{(1)}$:

- One (1) Harmony House Table #4S and 4 stools
- One (1) Harmony House Divan Bed, #48087

You are directed to notify⁽²⁾: PAUL PARHAM, Defendant(s), that⁽³⁾ SEARS, ROEBUCK AND CO., Plaintiff(s), has (have) commenced an Action of Replevin With Bond, which said Defendant(s) is (are) required to defend.

If the property replevied is found in the possession of anyone not a Defendant, you are directed to notify him

⁽¹⁾ Specifically describe property.

⁽²⁾ Name(s) of Defendant(s).

⁽³⁾ Name(s) of Plaintiff(s).

that he has been added as a Defendant, and is required to defend the action.

AMERICO V. CORTESE Prothonotary

By /s/ J. Gargiulo Clerk

Date Sep. 11, 1970

A TRUE COPY

Attest:

/s/ C. Dewdy & G. Edwardy Deputy Sheriff

737

SEPTEMBER TERM

1970

C. P.

IN THE COUNTY COURT OF PHILADELPHIA

SEARS, ROEBUCK AND Co. Adams & Whitaker Ave. Phila., Penna.

-vs-

PAUL PARHAM 611 North 54th Street Phila., Penna.

> REPLEVIN WITH BOND

\$00.00

ANTHONY W. NOVASITIS, JR. 1004 [Illegible] Bldg. N.W. Cor. 15th & Chestnut Sts. Phila., Pa. 19102 LO 8-1587

Ехнівіт "Н"

COURT OF COMMON PLEAS OF PHILA. COUNTY SEPTEMBER TERM, 1970

No. 737

SEARS, ROEBUCK AND Co., Adams & Whitaker Ave., Phila., Pennsylvania

-vs-

PAUL PARHAM, 611 North 54th St., Phila., Penna. PRAECIPE FOR WRIT OF REPLEVIN WITH BOND TO THE PROTHONOTARY:

Kindly issue Writ of Replevin with Bond for the following described personal property Ret. Sec. Leg.

One (1) Harmony House Table #4S and 4 stools One (1) Harmony House Divan Bed, #48087

ANTHONY W. NOVASITIS, JR. Attorney for Plaintiff

AFFIDAVIT OF VALUE

I, ANTHONY W. NOVASITIS, JR., being duly sworn according to law, depose and say that I am attorney-infact for the above named corporation, and that I am duly authorized to take this affidavit on its behalf, and that the value of the said goods herein contained is \$250.00.

AS ABOVE.

ANTHONY W. NOVASITIS, JR.

Sworn to and Subscribed before me this 10th day of Sept., 1970.

Notary Public My Commission Expires: [SEAL] DOROTHY M. KEGLER [Illegible]

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

SEPT. TERM, 1970

No. 737

SEARS, ROEBUCK AND Co.

vs.

PAUL PARHAM, 611 N. 54th Street, Philadelphia, Penna.

KNOW ALL MEN BY THESE PRESENTS, that we Sears, Roebuck & Co. Principal(s) Address

and Fidelity and Deposit Company of Maryland Surety(ies) Address 2800 Two Girard Plaza, Phila., Pa. are held and firmly bound unto the Commonwealth of Pennsylvania as obligee in the sum of Five hundred and 00/100 (\$500.00)--- Dollars, lawful money of the United States of America, to which payment well and truly to be made, we do bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally, firmly by these presents.

WHEREAS, the plaintiff(s) in the above named action has (have) instituted an action of replevin by writ with bond to the said court term and number against the defendant(s); AND,

NOW THE CONDITION OF THIS OBLIGATION IS SUCH, That if the plaintiff(s) fail(s) to maintain his (her) (their) (its) right of possession of the property, he (she) (they) (it) shall pay to the party(ies) entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the said writ of replevin with bond, then this obligation shall be void; otherwise it shall remain in full force and virtue.

Dated this 4th day of September, 1970

SEARS, ROEBUCK & CO. [SEAL]

By: /s/ Anthony W. Novasitis, Jr. [SEAL]

P/A 3247

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND

[SEAL]

By: /s/ Mary E. Lay
MARY E. Lay
Attorney-in-fact
P/A #8295

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS

v.

AMERICO V. CORTESE, ET AL., DEFENDANTS

STIPULATION—Filed November 10, 1970

AND NOW, this 26th day of October, 1970, it is hereby stipulated and agreed between counsel for Plaintiffs and counsel for Defendants Americo V. Cortese, Prothonotary of the Courts of Common Pleas of Philadelphia County, and William M. Lennox, Sheriff of the County of Philadelphia, that:

- 1. Writs of replevin with bond have been issued by Defendant Cortese or his agents and executed upon by Defendant Lennox or his agents against the following named plaintiffs in the Court of Common Pleas of Philadelphia County in the following respective terms and at the following respective docket numbers:
 - a. Mitchell Epps, August Term, 1970, No. 4082;
 - b. Paul Parham, September Term, 1970, No. 737;
 - c. Rosa Bell Andrews Washington, September Term, 1970, No. 1154.
- 2. Writs of replevin with bond have been issued by the Prothonotary of Philadelphia County or his agents and executed upon by the Sheriff of Philadelphia County or his agents against numerous other individual residents of the Commonwealth of Pennsylvania since 1705.
- 3. Writs of replevin will continue to be so issued and executed upon by the respective Defendants or their agents against numerous additional individual residents of the Commonwealth of Pennsylvania upon the presen-

tation by any claimant of the requisite documents in accordance with the acts of assembly and the Pennsylvania Rules of Civil Procedure made and provided for in such cases unless and until this court enjoins such actions.

- 4. To obtain a writ of replevin with bond, the party seeking such a writ need file with Defendant Cortese or his agents the following and the following only:
 - a. A praecipe for a writ of replevin with bond;
 - b. An affidavit of the value of the property to be replevied; and
 - c. A bond in double the value of the property.
- 5. Defendant Cortese or his agents do not and are not authorized to, request from the party seeking a writ of replevin with bond any information concerning his alleged justification for demanding the execution of a writ. They are simply required to issue the writ to Defendant Lennox or his agents for execution if the three items cited in the foregoing paragraph are duly filed with them.
- 6. Neither Defendant Cortese or his agents nor Defendant Lennox or his agents supply any notice, whether formal or informal, to the defendants on writs of replevin with bond prior to execution, nor is any such notice required.
- 7. Defendant Lennox or his agents, upon the issuance of writ of replevin with bond by Defendant Cortese or his agents, are required to execute upon the writ forthwith.
- 8. Defendant Lennox or his agents, when executing upon a writ of replevin with bond, are required to enter the home of the defendant on the writ and to seize with or without the consent of the defendant any and all of the property cited in the writ.
- 9. Neither Defendant Lennox or his agents make any determination concerning the rights of the plaintiff on the writ to possess the defendant's property and they are neither required or even permitted to hear or determine any issues of either the plaintiff's or the defendant's rights to the property.

10. Defendant Lennox or his agents, after seizing and taking possession of the property, must hold it for a period of seventy-two (72) hours, during which time the defendant on the writ may reclaim the property if he files a counterbond.

11. The form of writ required by rule of court contains no notice to the defendant on the writ that he may recover the property through the procedure set out in

the foregoing paragraph.

12. If the defendant on the writ fails to file the counterbond within the 72-hour period, Defendant Lennox or his agents are required to deliver the property seized to the plaintiff on the writ.

- /s/ Joel G. Weisberg Attorney for Plaintiffs
- /s/ Harry Wolov
 Attorney for Defendants
 Americo V. Cortese
 William M. Lennox

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, ET AL., PLAINTIFFS

vs.

AMERICO V. CORTESE, ET AL., DEFENDANTS

STIPULATION—Filed November 10, 1970

AND NOW, this 9th day of November, 1970, it is hereby Stipulated by and between counsel for plaintiffs and counsel for defendant, Government Employees Exchange Corporation that:

- 1. Writs of replevin with bond have been issued by defendant Cortese or his agents and executed upon by defendant Lennox or his agents against the following named plaintiffs in the Court of Common Pleas of Philadelphia County in the following respective docket numbers:
 - a. Mitchell Epps, August Term, 1970, No. 4082;

b. Paul Parham, September Term, 1970, No. 737;
c. Rosa Bell Andrews Washington, September

- c. Rosa Bell Andrews Washington, September Term, 1970, No. 1154.
- 2. Prothonotary and Sheriff's dockets show numerous prior replevin with bond actions instituted and executed upon since 1705.
- 3. Under statutes and rules regulating the issuance of writs of replevin, defendants, Prothonotary and Sheriff are required to execute writs upon the presentation by any claimant of the requisite documents, in accordance with the Acts of Assembly and the Pennsylvania Rules of Civil Procedure made and provided for in such cases.

4. To obtain a writ of replevin with bond, the party seeking such a writ need file with defendant Cortese or his agents the following and the following only:

a. An Entry of Appearance;

b. A Praecipe for a writ of replevin with bond;

c. An affidavit of the value of the property to be replevied; and

d. A bond in double the value of the property.

5. The Prothonotary or his agents do not and are not authorized to request from the party seeking a replevin with bond, any information concerning their alleged justification for demand in the execution of a writ. The Prothonotary is simply required to issue the writ to the Sheriff or his agent for execution if the four (4) items cited in paragraph 4 above are in proper order and duly filed.

6. Neither the Prothonotary or the Sheriff are required, under the Replevin with Bond Acts or applicable rule, to give notice of any kind to the defendant therein prior to the execution of said writ.

7. Upon the issuance of the writ of replevin with bond by the Prothonotary, the Sheriff is required to exe-

cute upon said writ forthwith.

8. Neither the applicable Replevin with Bond Acts nor rules expressly set forth that the Sheriff pursuant to the writ with bond may break and/or enter or that he may not break or enter.

9. In none of the individual cases did the Sheriff

break and enter into the premises of plaintiffs.

10. Neither the Sheriff nor his agent have any discretion in determining the underlying transaction giving

rise to the replevin with bond action.

- 11. The Sheriff or his agents, after seizing and taking possession of the property, must hold it for a period of seventy-two (72) hours, during which time the defendant on the writ may reclaim the property if he files a counterbond.
- 12. The form of the writ required by C. P. Rule 1354, contains no notice to the defendant, on the writ, that

he may recover the property by posting a counterbond,

nor does it expressly prohibit said notice.

13. If the defendant on the writ fails to file the counterbond within the seventy-two (72) hour period, the Sheriff or his agents are required to deliver the property seized to the plaintiff on the writ, subject to Rule 1079 dealing with impounding.

14. All of the exhibits attached to defendant, Government Employees Exchange Corporation's Answer and Counterclaim, were signed by plaintiff, Epps and all of the exhibits entitled "Retail Installment Contract-Security Agreement", contained inter-allia, the following:

"You or assigns shall retain title to said merchandise; I will be responsible for its loss or damage; I will not remove or encumber same; if I default in any payment or breach any covenant herein, the entire balance shall be immediately due and payable and you or assigns may retake the merchandise, sell the same and hold me for any deficiency, or affirm the sale and hold me liable for the unpaid balance . . . Notice to Buyer:

1. Do not sign this contract before you read it or if

it contains any blank spaces."

15. Plaintiff Epps, at the time of the institution of the replevin action, earned in excess of Ten Thousand Dollars (\$10,000.00) per year.

16. The enclosed credit application, attached hereto and made a part hereof, contains the information given by plaintiff, Epps, to defendant, Government Employees Exchange Corporation, on or about April 18, 1968.

Plaintiffs' attorney stipulates to the facts contained

herein but does not agree to their relevancy.

/s/ Joel G. Weisberg Attorney for Plaintiffs

> /s/ Ronald Jay Bayer Attorney for Defendant

Government Employees Exchange Corporation

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated

v.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, 228 City Hall, Philadelphia, Pennsylvania; and WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, Third Floor, City Hall, Philadelphia, Pennsylvania; LEWIS WASHINGTON, 4228 Girard Avenue, Philadelphia, Pennsylvania; GOVERNMENT EMPLOYEES EXCHÂNGE CORP., Kaign Avenue and Crescent Blvd., Pennsauken, New Jersey; and SEARS, ROEBUCK AND COMPANY, Adams and Whitaker Avenues, Philadelphia, Pennsylvania; on behalf of themselves and all other similarly situated

OPINION-March 31, 1971

Before J. Cullen Ganey, Judge, Circuit Court; E. Mac TROUTMAN and JOHN B. HANNUM, Judges, District Court

TROUTMAN, J.

Plaintiffs challenge the constitutionality of those Pennsylvania statutes and rules of civil procedure which provide for the civil action of replevin with bond. Act of 1705, 1 Sm. L 44, § 12, 12 P.S. § 1821, and April 19, 1901, P.L. 88, as amended, 12 P.S. § 1824-5; Pennsylvania Rules of Civil Procedure 1071-1087.

¹ The Pennsylvania statutes and rules of civil procedure relating to replevin without bond are not in question and are not challenged.

Plaintiffs seek a permanent injunction restraining the defendant Cortese, Prothonotary of the Courts of Philadelphia County, and the defendant Lennox, Sheriff of Philadelphia County, from issuing and executing upon any and all writs of replevin with bond. Since the complaint places in issue the constitutionality of statutes and rules of state-wide application, this statutory three-judge court has been convened pursuant to the provisions of 28 U.S.C. §§ 2281-84.

The individual plaintiffs are citizens and residents of Philadelphia, Pennsylvania, from whom goods or chattels have been seized pursuant to writs of replevin with bond duly issued and executed respectively by the Prothonotary and Sheriff of Philadelphia County. The corporate defendants, Government Employees Exchange Corporation, and Sears. Roebuck & Company, are creditors who caused two of the writs in question to be issued. The remaining defendant, Lewis Washington, is an individual Pennsylvania resident.

The matter is presently before the Court upon a stipulated record as if on final hearing by agreement of counsel. Presently before the Court for disposition are crossmotions for summary judgment. The facts as stipulated to and agreed upon by and among the parties are as

follows:

1. Writs of replevin with bond have been issued by defendant Cortese or his agents and executed upon by defendant Lennox or his agents against the following named plaintiffs in the Court of Common Pleas of Philadelphia County:

- (a) Mitchell Epps, August Term 1970, No. 4082;(b) Paul Parham, September Term 1970, No. 737;
- (c) Rosa Bell Andrews Washington, September Term 1970. No. 1154.

² There has been no stipulation as to defendant Washington. However, his uncontradicted testimony establishes that the property replevied, consisting of a bed, lamp, bicycle and other items, was owned by him and used by his son, of whom he had custody following divorce proceedings and separation from his wife. (See transcript of proceedings on September 25, 1970.) He recovered only that which was his for use by his son living with him.

2. Writs of replevin with bond have been issued by the Prothonotary of Philadelphia County or his agents and executed upon by the Sheriff of Philadelphia County or his agents, against numerous other individual residents of the Commonwealth of Pennsylvania since 1705.

3. Under the statutes and rules regulating the issuance of writs of replevin with bond, the Prothonotary and Sheriff are required to issue and execute the writs upon the presentation by any claimant of the requisite documents in accordance with the Acts of Assembly and the Pennsylvania Rules of Civil Procedure applicable to such cases.

4. To obtain a writ of replevin with bond, the party seeking such a writ need file with the Prothonotary or his agents the following documents:

his agents the following documen

(a) An entry of appearance;(b) A praecipe for a writ of replevin with bond;

(c) An affidavit of the value of the property to be replevied; and

(d) A bond in double the value of the property.

5. The Prothonotary or his agents do not and are not authorized to request from the party seeking replevin with bond any information concerning their alleged justification for demand in the execution of a writ.

6. Neither the Prothonotary nor the Sheriff are required, under the Replevin With Bond Acts and rules, to give notice of any kind to the defendant named in the

writ other than service of the writ itself.

7. The Sheriff, or his agents, upon the issuance of a writ of replevin with bond by the Prothonotary, or his agents, is required to execute upon the writ forthwith.

8. The Sheriff, or his agents, when executing upon a writ of replevin with bond, is required to enter the home of the defendant on the writ and to seize with or without consent of the defendant any and all of the property named in the writ.

9. Neither the Replevin With Bond Act nor the rules expressly set forth that the Sheriff, pursuant to the writ with bond, may forcibly break and enter or that he may not break or enter.

10. In none of the individual cases did the Sheriff forcibly break and enter into the premises of plaintiffs.

11. Neither the Sheriff nor his agents have any discretion in determining the underlying transaction giving rise to the replevin with bond action. They are not required or permitted to hear or determine any issues of the rights of either of the parties to the property in question.

12. The Sheriff, or his agents, after seizing and taking possession of the property named in the writ, must hold it in his custody for a period of seventy-two hours, during which time the defendant named on the writ may regain possession of the property by filing a counter-

bond in the same amount as the original bond.

13. The form of the writ required by Pennsylvania Rules of Civil Procedure, Rule 1354, contains no notice to the defendant that he may recover the property by posting a counter-bond, nor does it expressly prohibit this notice.

14. If the defendant on the writ fails to file the counter-bond within the seventy-two hour period, the Sheriff, or his agents, is required to deliver the property seized to the plaintiff on the writ, subject to Rule 1079 dealing with impounding.

15. The plaintiff, Epps, and the defendant, Government Employees Exchange Corporation, are the parties to a contract entitled "Retail Installment Contract—Security Agreement" which provides, inter alia, the

following:

"You or assigns shall retain title to said merchandise; I will be responsible for its loss or damage; I will not remove or encumber same; if I default in any payment or breach any covenant herein, the entire balance shall be immediately due and payable and you or assigns may retake the merchandise, sell the same and hold me for any deficiency, or affirm the sale and hold me liable for the unpaid balance . . . Notice to buyer:

1. Do not sign this contract before you read it or if it contains any blank spaces."

16. The property named in the writ to be replevied from plaintiff Epps consisted of one G. E. stereo, two wedding rings, a diamond watch and band and a T.V. roof antenna.

17. Plaintiff Epps, at the time of the institution of the replevin action, earned in excess of \$10,000 per year.

18. On February 1, 1969, the plaintiff, Paul Parham, and the defendant, Sears, Roebuck and Co., entered into a similar retail credit contract also providing that the seller retain title in the goods sold and that upon default the seller may at his option repossess the goods. The plaintiff, Ellen Parham, was not a party to the contract.

19. A Harmony House table and four stools and a divan bed were delivered to the plaintiff, Paul Parham, and possession was retained by him in his home until the goods were replevied by the Sheriff of Philadelphia

County.

20. The agreements entered into by plaintiffs Epps and Parham comply with the provisions of the Uniform Commercial Code of Pennsylvania and the Goods and Services Installment Sales Act.

21. The payment record of the plaintiff, Paul Parham, shows that there were defaults on his part as to the

agreement of February 1, 1969.

22. There were nine (9) telephone calls made by the defendant, Sears, or its representatives, to Mr. Parham and five (5) written communications were also sent. The dates on which such written communications were sent are respectively: May 16, 1970, May 22, 1970, June 22, 1970, July 22, 1970, and August 19, 1970. There were also two (2) personal visits to the home of the plaintiff. All of these telephone calls, letters and visits concerned the problem of the account and its status.

23. On September 11, 1970, a Writ of Replevin with Bond was issued by the Prothonotary of Philadelphia County on behalf of the defendant, Sears, Roebuck and Co., upon the filing by it with the Prothonotary of a bond as required by the Replevin Statutes and Rules, an entry of appearance by the attorney acting for Sears, Roebuck and Co., and a praecipe for the issuance of the writ. There was also filed with the Prothonotary an affidavit

stating that the value of the property was \$250.00. A bond in the amount of twice the value of the property was also filed.

24. On September 15, 1970, the goods were removed from the home by the office of the Sheriff of Philadelphia County in accordance with the command of the writ. At that time, the original writ was exhibited to the plaintiff's wife, Ellen Parham, and a copy of the said writ was left with her. There was no violence, no breaking and entering, and Ellen Parham admitted the Sheriff to the house for the purpose of executing the replevin in accordance with the mandate of the writ.

25. The defendant, Sears, Roebuck and Co., has not filed a complaint in the replevin action and the plaintiff, Paul Parham, has not requested it to do so, which he would have a right to do under the Replevin Rules and

Statutes.

I.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1343, 42 U.S.C. § 1983, 28 U.S.C. § 2281-84, and 28 U.S.C. § 2201-02 seeking to redress alleged deprivations, under color of state law, of rights, privileges and immunities secured by the Federal Constitution. More particularly, plaintiffs complain that the Pennsylvania statutes and rules relating to replevin with bond are unconstitutional on their face in that they:

1. Authorize prejudgment seizure of goods or chattels without notice and prior to any judicial determination in violation of the due process clause of the Fourteenth Amendment;

2. Subject plaintiffs to unreasonable searches and seizures without a warrant in violation of the prohibi-

tions of the Fourth Amendment, and

3. Require the posting of a counter-bond in twice the amount of the property replevied which has the effect of denying low-income individuals access to the courts and, therefore, equal protection of the laws.

A careful reading of the allegations in the plaintiffs' complaint indicates that substantial constitutional issues are raised. It is contended, however, that plaintiffs' claims are not cognizable under 28 U.S.C. § 1343 (3) because they are all "dependent for their existence upon the infringement of property rights". Hauge v. C.I.O., 307 U.S. 496, 531 (1939) (Stone, J. concurring); Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969); see also National Land Investment Co. v. Specter, 428 F. 2d 91, 98-100 (3rd Cir. 1970) (dictum); Lynch v. Household Finance Corp., 318 F. Supp. 1111 (D. Conn. 1970). But see Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351, 354 (N.D. Ill. 1965); Note, The Proper Scope of the Civil Rights Acts, 66 Harv, L. Rev. 1285 (1953). At least one of the plaintiffs' claims, namely, the right to be free from unreasonable searches and seizures, has been held to be squarely within the purview of the Civil Rights Act. Monroe v. Pape, 365 U.S. 167 (1960). Plaintiffs' allegations in this respect would be sufficient to confer jurisdiction under the Civil Rights Act, as there is no question that the Sheriff or his deputies here act under color of State law in executing the writs. See Monroe v. Pape, supra. We need not be concerned with an evaluation of the advantages or disadvantages of a broad or narrow construction of Justice Stone's Haque formulation at this point since there is alleged in this complaint a valid basis for Federal jurisdiction. As we view the remaining allegations, apart from the Fourth Amendment, they state, as alleged, grounds in some respects similar to those recently ruled upon by the Supreme Court. See Goldberg v. Kelly, 397 U.S. 254 (1970): Rosado v. Wyman, 397 U.S. 254 (1970); Shapiro v. Thompson, 374 U.S. 618 (1969); Snidach v. Family Finance Corp., 395 U.S. 337 (1969); King v. Smith, 392 U.S. 309 (1968). See also Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) and Escalera v. N.Y.C. Housing Authority, 425 F. 2d 853 (2d Cir. 1970).

II.

CLASS ACTION

Plaintiffs, pursuant to Fed. R. Civ. P. 23, seek to have this action maintained as a class action. They seek to define the class as all residents of the Commonwealth of Pennsylvania who are or may be subject to the issuance of writs of replevin with bond. Since plaintiffs have narrowly delimited the thrust of their argument so as to only challenge the constitutionality of the Pennsylvania statutes and rules on their face and not as applied, we find it unnecessary to make a determination of the class. If the Court were to give plaintiffs the relief they request and ultimately rule that the statutes and rules in question are unconstitutional on their face, such a ruling would, in any event, determine the validity of the statute as it applies to all Pennsylvania residents. We, therefore, need not and do not indulge in an unnecessary analysis of the arguments and authorities cited on this issue, but shall turn to the merits of the case.

III.

CONSTITUTIONALITY

Undoubtedly, plaintiffs here challenge a remedy of ancient origin, indeed one of the earliest remedies known to the common law. J. Cobbey, A Practical Treatise on the Law of Replevin § 1, at 1 (2d Ed. 1900). The action of replevin is designed to permit one having the right to possession to recover property in specie from one who has either wrongfully taken or detained the property in question. At early common law a form of replevin with bond was considered to be a tenant's sole remedy against a landlord who had wrongfully distrained his goods.³

The Pennsylvania Replevin statute, 18 P.S. § 1821, permits writs of replevin in "all cases whatsoever, where replevin may be granted by the laws of England"; how-

³ The common-law procedure has recently been detailed by a member of our Court in Santiago v. McElroy, supra, at n.5.

ever, the procedural aspects which are the subject of challenge here have subsequently been established in

Pennsylvania Rules of Civil Procedure 1071-87.4

Under the Pennsylvania practice, the action with bond is commenced by the filing of a praecipe for a writ of replevin accompanied by an affidavit stating plaintiff's determination of the value of the property and a bond in double that value.6 Pa. R. Civ. P. 1073 (a). A complaint is not required to be filed. The Sheriff is required to serve the writ describing the property upon the defendant and any person found in possession of the property and is required to take possession of the property described, Pa. R. Civ. P. 1074, unless the plaintiff on the writ permits the property to remain in the hands of the defendant. Pa. R. Civ. P. 1073. The Sheriff is required to hold the property for a period of seventy-two hours within which time the defendant may regain possession by filing a counter-bond with the Prothonotary in the same amount as the original bond. Pa. R. Civ. P. 1076. When a plaintiff petitions the Court during the pendency of the action stating either that the property cannot be located or has been concealed or removed, the Court may order the defendant examined as to the whereabouts of the property and may order that the property be delivered to the Sheriff. Pa. Civ. P. 1081. Where no counter-bond is filed, the Sheriff delivers the property to the plaintiff on the writ. A party who asserts a right to the property by his action and who fails to maintain his right to possession is required to pay the party entitled thereto the value of the property in addition to all legal costs, and fees and all damages sustained by reason of the issuance of the writ. Pa. R. Civ. P. 1073 (a) (2).

Plaintiffs, in their primary constitutional attack, contend that the above cited scheme of statutes and rules, on its face, operates to deprive them of their property

⁴ See Pa. R. Civ. P. 1456.

⁵ Plaintiffs' determination of the value of the property is not binding on the defendant. *Gaspero* v. *Gentile*, 160 Pa. Super. 276 (1947).

without due process of law. In so arguing plaintiffs place great reliance upon the Supreme Court's two recent decisions in *Snidach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Admittedly, there are broad and general procedural

similarities between those cases and the instant case; however, both have centrally distinguishing and compelling facts which make them inapposite to the case before this Court. In Snidach the Supreme Court held that the Wisconsin prejudgment wage garnishment procedure violated fundamental principles of due process. The Court was understandably concerned with the compelling circumstances that an individual's wages were, without notice, indefinitely "frozen" pending the outcome of extended litigation. The Court emphasized the unique characteristic of wages as a "specialized type of property presenting distinct problems in our economic system". (Emphasis added) 395 U.S. at 340. To refer to wages as a "specialized type of property" is to understate the differences between wages and all other types of property. To refer to wages as "presenting distinct problems in our economic system" is to again understate the wholly unique problems incident to the seizure of wages as opposed to all other types of property. That was, for the purposes of Snidach, a sufficient reference. It is obvious that wages are more than mere property. They are the means or medium by and through which the necessities of life are purchased. To deny the prejudgment attachment of the medium or means of exchange is fundamental to the orderly workings of the economics of a complex society. Wages belong to the wage earner until they are pledged or committed to another. Because they are used in so many different ways and because they have no practical substitute, they should not and must not become the subject of prejudgment attachment without notice by a collateral creditor.

Because wages have no substitute and because they are each day used to obtain and meet the needs of that day, they are quite unlike the property here involved—stereo sets, rings, diamond watches, tables, stools and beds. The debtor can temporarily live without such prop-

erty while its owner seeks its return in kind. In Snidach, the creditor sought property to which he had no title and which, because of its unique character, was an irreplaceable necessity to the debtor. In contrast, the creditor here seeks specifically identifiable property to which he has reserved title and which he now seeks in order to prevent its loss, concealment or destruction. To eliminate a summary remedy which permits immediate repossession of secured property may well limit an aggrieved creditor to a worthless judgment with the attendant legal expense of obtaining it. Snidach involved a seizure grounded in a collateral claim on a promissory note where the creditor utilizing the garnishment procdure had no colorable interest whatsoever in the debtor's wages nor any interest in protecting or preserving his own property. The situation in Snidach, therefore, is readily distinguishable both factually and in principle from a replevin with bond action where a purchase money creditor is seeking, by way of legal process, to protect a validly created security interest in specific and identifiable property.

Goldberg v. Kelly, supra, is also inapposite. Like Snidach, compelling circumstances were paramount in the Court's analysis. "Welfare benefits" there were the equivalent of the "wages" earned in the Snidach case. The "benefits" were "money" in the hands of the recipient, the medium of exchange through which to obtain the day's needs. That it was "welfare" rather than "wages" is legally insignificant. The pre-hearing termination of welfare benefits deprived ostensibly eligible recipients of the very means by which to live for an indeterminate period of time. The governmental interest in preserving the uninterrupted receipt of welfare, considering the "brutal need" and destitute circumstances of the ostensibly eligible welfare recipients clearly outweighed countervailing fiscal and administrative considerations. Both Snidach and Goldberg, supra, must be understood in light of the particular facts before the Court and should not be read so as to automatically declare all provisional remedies regarding seizure of property unconstitutional regardless of the circumstances of the particular case. See e.g. Brunswick Corp. v. J. & P. Inc., 424 F. 2d 100 (10th Cir. 1969).

The term "due process of law" has been subject to varied interpretations and applications, but at the very least, it implies a process of weighing and balancing the various interests of the State and individuals in judging whether a particular procedural scheme or process satisfies rudimentary principles of fairness. Its application is not mechanical or a matter of formula, but rather is a process of "adjustment". Joint Anti Fascist Committee v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring); Cafeteria Workers v. McElroy, 367 U.S. 886 (1960); Ng Fung Ho v. White, 259 U.S. 276 (1922); Communications Comm. v. W. J. R., 337 U.S. 265, 275 (1949); Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 372 (1856).

In the instant case, based upon the facts as stipulated, we find no irreparable harm or unconscionable hardships akin to those suffered in *Snidach*, *Goldberg* and the related cases cited by plaintiffs. Replevin with bond as prescribed by the Pennsylvania procedures and pursuant to a conditional sales contract authorizing repossession to protect a title or a valid security interest in our opinion is a situation in which prejudgment seizure of goods without a prior hearing is justified when followed by certain remedies and safeguards here involved. The plaintiffs have not shown that they suffered "grievous

[°]A number of cases cited by plaintiffs are inapposite for the reasons set forth above. See e.g., Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969) (Termination of public assistance grants); McCalloy v. Carberry, — Cal.2d —, 464 P. 2d 122, 83 Cal. Rptr. 666 (197) (prejudgment wage attachment); Jones Press, Inc. v. Motor Travel Servs. Inc., — Minn. —, 176 N.W.2d 87 (1970) (prejudgment garnishment of accounts receivable); Larson v. Fetherston, 44 Wisc. 2d 712, 172 NW 2d 20 (1969) (prejudgment garnishment of bank accounts) Mills v. Bartlett, 265 A.2d 39 (Del. Super. 1970) (prejudgment foreign wage attachment); McConaghley v. New York, 60 Misc. 2d 825, 304 N.Y.S.2d 136 (N.Y. County Civ. Ct. 1969) (retention of monies covering hospital expenses prior to determination of whether patient was impecunious).

loss" of any kind by reason of the temporary dispossession suffered here. There is no finality accorded to the initial taking by the Sheriff here, nor is there the type of permanent stigma and disgrace which compelled the Supreme Court's decision most recently in Wisconsin v.

Constantineau, U.S. (1971).

Plaintiffs, in arguing that the Pennsylvania procedure, on its face, violates due process, suggest that in every provisional remedy, there must be an evidentiary hearing prior to any seizure of property. However, one of the "fundamental requisites of due process of law is the opportunity to be heard" (Emphasis added). Goldberg v. Kelly, 397 U.S. at 267; Grannis v. Ordean, 234 U.S. 385, 394 (1914). Due process does not necessarily require a pre-seizure hearing in all cases, but rather demands that there be a reasonable opportunity to be heard and present defenses at some meaningful time and in some meaningful manner. See Coffin Bros. v. Bennett. 277 U.S. 29, 31 (1927); Philips v. Commissioner, 283 U.S. 589, 596-97 (1930); Murray's Lessee v. Hoboken Land & Improvement Co., 18 How, 272 (1856); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). "Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment". American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932).

Under the Pennsylvania replevin with bond procedure the Sheriff, by service of the writ itself, gives the defendant named on the writ actual notice of the pendency of another's claim to a possessory interest in the specific property involved. After the property is taken, each defendant named in the writ is not automatically and forever dispossessed, nor is his adversary's right to possession or title then determined. The property is not forthwith delivered to the plaintiff on the writ. The Pennsylvania procedure is specifically designed so that the defendant, served with the writ, may within a sev-

⁷ The property involved in this suit is clearly the garden variety kind of property and does not constitute the "specialized" kinds of property contemplated by the *Snidach* and *Goldberg* cases.

enty-two hour period regain possession by filing a counter-bond equivalent to the bond obtained by the party initiating the action. Pa. R. Civ. P. 1076. Upon the filing of a counter-bond, the Sheriff is required to return the property to its original possessor pending a hearing to determine the plaintiff's right to title or possession. Adequate safeguards are built into the Pennsylvania procedure to avoid misuse or abuse of process. Rule 1073 (a) (2) specifically provides that "if the plaintiff fails to maintain his right to possession * * he shall pay to the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ." Thus, the debtor is made whole including damages for deprivation of the possesion of the unspecialized property here involved.

It is apparent from the foregoing that Pennsylvania's procedure for replevin with bond provides the immediate opportunity to repossess the property taken. Thereafter, it is incumbent upon the original moving party to establish his superior right at a hearing at a subsequent time, failing which, the liabilities, including damages, attach as provided in the Pennsylvania rules. We cannot say that this procedure on its face is fundamentally unfair.

The State and creditor interests adverted to in Snidach, supra, are present in this case. Clearly, the State has a countervailing interest in summary seizure by replevin which is to be weighed against plaintiffs' right not to be temporarily deprived of their property prior to a hearing on the merits. Initially, summary seizure conserves State financial resources and administrative time in reducing the number of evidentiary hearings in a given lawsuit. Additionally, the State and creditor interests coincide in providing a protective remedy for those who have retained title to or security interest in specific and unspecialized property by authorizing procedures designed to prevent destruction, misuse or concealment of property by the debtor pending final disposition.

^{*}Upon application to the Court, the time for filing a counterbond may be extended by the Court for cause shown. Pa.R.Civ.P. 1076 (a).

Adequate remedies made available to creditor interests are necessary to the preservation and continuation of retail credit upon which vast numbers of people must necessarily rely in a constantly inflated economy. To deny the creditor an adequate and practical remedy may deny the debtor of his only means of obtaining many widely accepted, but costly, items, the enjoyment of which should not be reserved to the wealthy. The preservation of adequate remedies is also necessary to the maintenance of many large and small retail businesses without which our economy might well substantially decline to the detriment of the very individuals whom plaintiffs

here seek to protect.º

We have based our determination solely on the face of the statutes and rules in question and in light of the present record. Plaintiffs have failed to demonstrate on this record the fundamental unfairness of the Pennsylvania statutes and rules per se on due process grounds. We have not been asked to and do not consider the constitutionality of this procedure as it may be applied. used or misused in hypothetical circumstances of undue hardship not presently before the Court. We recognize the importance of not imposing procedural requirements upon the Sttae other than those demanded by the rudimentary concepts of due process. Goldberg v. Kelly. 397 U.S. at 267. We hesitate to make such an imposition considering the presumption of constitutionality which clothes the Pennsylvania procedures involved on the present record.

Plaintiffs rely heavily upon LaPrease v. Raymours Furniture Co., C.A. 70-Cv-16 (N.D. N.Y. July 30, 1970). The provisions of the statute there being considered and the record before the Court may well distinguish it from the instant case. The statutory scheme in LaPrease did not provide, as does the one before us, remedies to make the debtor completely whole by the award of all costs,

⁹ We can conceive situations where replevin may be employed to prevent spoilage of perishable goods wrongfully possessed where absent a summary seizure such goods would be lost. Undoubtedly, there may be many other circumstances where immediate action is necessary.

damages and fees. Additionally, the New York statute provided that the Sheriff shall forcibly enter. Pennsylvania's rules do not so provide; moreover, forcible entry was threatened in LaPrease whereas on our record there clearly was no forcible entry or threat thereof. Furthermore, in LaPrease the debtor alleged a meritorious defense and default was specifically denied. Interestingly, the LaPrease court distinguished the Brunswick case on the theory that a default had been admitted in Brunswisk, but denied in LaPrease. Thus, the instant case, where default is not denied, is closer to Brunswick and on the theory advanced by the LaPrease court, we might well follow Brunswick. However, we need not and do not follow the theories of the LaPrease court. There may well be sufficient differences in the statutory procedures from those here involved. If not, we do not hesitate to state that we are in disagreement with LaPrease mainly due to what we consider to be misplaced reliance on the Snidach and Goldberg cases. We find ourselves in agreement with the analysis in Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970) 10 and Brunswick Corp. v. J. & P. Inc., 424 F. 2d 100 (10th Cir. 1970).11

Aside from their principal contention regarding due process, plaintiffs additionally argue that the Pennsylvania replevin with bond procedures deprive low-income individuals of equal protection of the laws and that the statutes and rules violate plaintiffs' right to be free from unreasonable searches and seizures. We are not convinced or persuaded by plaintiffs' arguments on these points.

With respect to the equal protection argument, there is no need for a lengthy analysis based upon the record before the Court. Plaintiffs have alleged generally that

¹⁰ We note that the Supreme Court has recently granted review of the Fuentes decision. See 39 U.S.L.W. 3359 (review granted Feb. 23, 1971).

¹¹ An additional problem raised in both Fuentes and Brunswick, supra, is whether plaintiffs by reason of their contracts have waived their rights. We have not been presented with evidence or arguments on this point and, therefore, do not reach this issue.

they are in poverty straits. Such allegations, if proved, might merit a more detailed consideration of the equal protection arguments. However, such allegations have not been proved—indeed the only specific evidence in the present record of the financial background of any of plaintiffs is that plaintiff Epps earns in excess of \$10,000 per year. Other than this, the record is silent. We are not presented with particularized evidence upon which we can make an intelligent judgment on this issue. See e.g. the evidence presented in Swab v. Lennox, 314 F. Supp. 1091, 1907 (E.D. Pa. 1970) and Santiago v. Mc-Elroy, 319 F. Supp. 284, 291 (E.D. Pa. 1970). Based upon the present record and absent such proof, we shall not engage in deciding hypothetical constitutional questions not placed before the Court in a concrete factual manner.

Plaintiffs' remaining contention generally stated is that based upon a broad reading of Camara v. Municipal Court. 387 U.S. 523 (1967) and See v. City of Seattle. 387 U.S. 547 (1967), Pennsylvania's replevin with bond procedures have authorized searches and seizures in violation of the Fourth Amendment. Assuming arguendo that the search and seizure provisions of the Fourth Amendment have not been waived by reason of the conditional sales contracts signed by plaintiffs in this case,13 and further assuming that the proscriptions of the Fourth Amendment apply to summary civil process to satisfy debt,18 we cannot find a violation upon the facts presented. In all the stipulated facts plaintiffs concede that each seizure, pursuant to a writ of replevin, was conducted in a peaceable manner. There were no threats or intimidation nor is there any evidence of a forcible entry. Pennsylvania's statutes and rules do not specifically authorize the use of force. The conduct herein complained of clearly "does not descend to the level of unreasonableness" which is the standard of the Fourth Amendment.

¹² But see Fuentes v. Faircloth, 317 F.2d 954, 956 (S.D. Fla. 1970). See Note 10, infra.

¹³ But see Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 59 U.S. 272, 285 (1856); Fuentes, supra, at 954.

See Wyman v. James, U.S. (1971), 39 U.S. L.W. 4085, 4087 (U.S. Jan. 12, 1971). See also Terry v. Ohio, 392 U.S. 1, 9 (1968); Elkins v. United States, 364 U.S. 206, 222 (1960). There is nothing in the instant record to indicate that the seizures were other than purely civil in nature, seeking property covered by lawfully created security interests. There is no suggestion that the seizures were made at unreasonable hours or in a forceful or reprehensible manner. These proceedings clearly are not quasi criminal in nature nor are they in aid of any criminal proceeding. On the basis of the facts before us, we are not convinced of the applicability of the Fourth Amendment to the proceedings here in issue nor, assuming it does apply, are we satisfied that the seizures were unreasonable. Therefore, we shall deny plaintiffs' motions for summary judgment and shall grant defendants' motions for summary judgment.

ORDER-Filed March 31, 1971

[File Endorsement Omitted]

AND NOW, this 31th day of March, 1971, IT IS ORDERED that plaintiffs' motions for summary judgment are DENIED; IT IS FURTHER ORDERED that defendants' motions for summary judgment are GRANT-ED.

- /s/ J. Cullen Ganey Circuit Judge
- /s/ E. Mac Troutman District Judge
- /s/ John B. Hannum District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-2592

[File Endorsement Omitted]

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, 288 City Hall, Philadelphia, Pennsylvania; and WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, Third Floor, City Hall, Philadelphia, Pennsylvania; LEWIS WASHINGTON, 4228 West Girard Avenue, Philadelphia, Pennsylvania; Government Employees Exchange Corporation, Kaign Avenue and Crescent Boulevard, Pennsauken, New Jersey; and Sears, Roebuck and Company, Adams and Whitaker Avenues, Philadelphia, Pennsylvania; on behalf of themselves and all others similarly situated, Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 8, 1971

Notice is hereby given that plaintiffs PAUL and ELLEN PARHAM and ROSA BELL ANDREWS WASHINGTON hereby appeal to the Supreme Court of the United States on behalf of themselves and all others similarly situated from the order of the court entered in the above-captioned matter on March 31, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

- /s/ David A. Scholl
- /s/ Harold I. Goodman
- /s/ Harvey N. Schmidt
- /s/ Laurence M. Lavin
 Attorneys for Plaintiffs
 Community Legal Services, Inc.
 313 South Juniper Street
 Philadelphia, Pennsylvania 19107

DATED: April 5, 1971

SUPREME COURT OF THE UNITED STATES

No. 6966, October Term, 1970

MITCHELL EPPS ET AL., APPELLANTS

v.

AMERICO V. CORTESE ET AL.

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

May 24, 1971

SUPREME COURT OF THE UNITED STATES

No. 6966, October Term, 1970

MITCHELL EPPS ET AL., APPELLANTS

22.

AMERICO V. CORTESE ET AL.

APPEAL from the United States District Court for

the Eastern District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for oral argument immediately following No. 6060.

May 24, 1971





IN THE

Supreme Court of the United States

States E. ROBERT SEAVER,

No. 70-5138

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated,

Appellants,

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, 288 City Hall, Philadelphia, Pennsylvania; and

WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, Third Floor, City Hall, Philadelphia Pennsylvania;

LEWIS WASHINGTON, 4228 West Girard Avenue, Philadelphia, Pennsylvania;

GOVERNMENT EMPLOYEES EXHCANGE CORPORA-TION, Kaign Avenue and Crescent Boulevard, Pennsauken, New Jersey; and

SEARS, ROEBUCK AND COMPANY, Adams and Whitaker Avenue, Philadelphia, Pennsylvania; on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS

DAVID A. SCHOLL HAROLD I. GOODMAN JONATHAN M. STEIN HARVEY N. SCHMIDT

> Community Legal Services, Inc. 313 South Juniper Street Philadelphia, Pennsylvania 19107

Attorneys for Appellants



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IN THE SUPREME COURT OF THE UNITED STATES

No. 70-5138

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated,

Appellants,

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, 288 City Hall, Philadelphia, Pennsylvania; and

WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, Third Floor, City Hall, Philadelphia Pennsylvania;

LEWIS WASHINGTON, 4228 West Girard Avenue, Philadelphia, Pennsylvania;

GOVERNMENT EMPLOYEES EXHCANGE CORPORA-TION, Kaign Avenue and Crescent Boulevard, Pennsauken, New Jersey; and

SEARS, ROEBUCK AND COMPANY, Adams and Whitaker Avenue, Philadelphia, Pennsylvania; on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS

OPINION BELOW

The Opinion and Order of the District Court, App. at 88-105 are reported at 326 F. Supp. 127 (E.D. Pa. 1971).

JURISDICTION

This suit is a civil rights action instituted under 28 U.S.C. §§ 1343(3) and (4), 2201, 2202, 2281, and 2284, and 42

U.S.C. § 1983. The Opinion and Order of the District Court were filed on March 31, 1971. Plaintiffs' Notice of Appeal was filed on April 8, 1971, and they submitted their Jurisdictional Statement in this Court on April 26, 1971. Probable jurisdiction was noted on May 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

- (1) Whether a statutory scheme of statewide application which authorizes the seizure of personal property of individuals by state officers without providing any notice or opportunity to be heard to these individuals prior to seizure and without requiring that the claimants to this property allege the validity of their claims prior to seizure is on its face a violation of these individuals' right to due process of law secured by the fourteenth amendment.
- (2) Whether a statutory scheme of statewide application which authorizes state officials to enter the homes of individuals and seize their personal property, forcibly if necessary, upon the claimants' mere filing of a bond and a writ directing such officials to seize this property is on its face a violation of these individuals' right to be free from unreasonable searches and seizures secured by the fourth and fourteenth amendments.

STATUTES INVOLVED

The Pennsylvania statutes and rules challenged are the Act of 1705, 1 Sm. L. 44, §12, 12 P.S. §1821, and the Act of April 19, 1901, P.L. 88, as amended, 12 P.S. §§ 1824-44. These statutes have been suspended insofar as they relate to procedure, except where deemed not suspended under Pa. R.C.P. 1406, by the Pennsylvania Rules of Civil Procedure. The rules challenged are Pa. R.C.P. 1071-87. These statutes and rules are set out in full in Appendix "A."

STATEMENT

On September 18, 1970, this action was commenced by Mitchell Epps, Paul and Ellen Parham, and Rosa Bell Andrews Washington, all individuals residing in Pennsylvania, on behalf of themselves and all other individual residents of Pennsylvania who are or may in the future be subject to the Pennsylvania replevin-with-bond procedure in Philadelphia County. 1 The relief sought by the plaintiffs was (1) a declaration that the statutes and rules establishing replevin are unconstitutional; (2) an injunction restraining the defendants from filing actions to obtain, issuing, and executing upon writs of replevin; and (3) an order that the property replevied from the named plaintiffs be returned. Named as defendants were the prothonotary and sheriff of Philadelphia County, who issue and execute upon, respectively, these writs, and the entities which had requested and obtained the writs of replevin against the named plaintiffs. These entities, Government Employees Exchange Corporation; Sears, Roebuck and Company; and Lewis Washington, respectively, were sued on their own behalf and on behalf of all other entities who have instituted or may in the future institute replevin actions in Philadelphia County.

The matter was presented to the court below entirely upon stipulations relating to the facts in the named plaintiffs' cases and the workings of the replevin procedure in Pennsylvania.

Plaintiff Mitchell Epps had, since 1968, two types of accounts with defendant Government Employees Exchange (hereinafter "GEX"): (1) a revolving charge account, on which he purchased chiefly wearing apparel; (2) time pay-

Hereinafter, this procedure shall be designated as "replevin." However, plaintiffs did not challenge the Pennsylvania procedure of replevin without bond, also provided for in the statutes and rules challenged, which permits recovery of personal property in specie after the claimant obtains a judgment.

ment accounts, on which he purchased various personal and household goods. See Appendix "B:" Account Status.²

In all of the time payment purchases, Epps had signed documents entitled RETAIL INSTALLMENT CONTRACT—SECURITY AGREEMENT. App. at 35. In this contract, Epps agreed that GEX retained "title" to the merchandise and that GEX could "retake" the merchandise upon default. Id. There is no record of his having signed any contract relating to the revolving charge account.

Although Epps had regularly made substantial payments on both accounts, he was in arrears on the revolving charge account in September, 1970. See App. "B." However, recent payments on the time payment accounts had eliminated any arrearages on these accounts. Id.³

On September 11, 1970, Epps was served with a writ of replevin which directed the Sheriff of Philadelphia County to replevy the goods which he had purchased on the time payment accounts. App. at 15-16. He was not provided with any notice of GEX's action prior to the execution of the writ. No complaint was filed then or at any later time by GEX, and their right to these goods has never been established. The procedure followed by GEX, as will be pointed out below, was completely in accordance with the Pennsylvania replevin procedure.

²This document was excluded from the official Appendix because it had never been marked as an Exhibit below. It was, however, presented to the court and all counsel at oral argument on January 13, 1971, by GEX's counsel and discussed by him and plaintiffs' counsel at some length. Plaintiffs did not discover that this document had not been marked as an Exhibit until they ordered transmission of the record. The Account Status was prepared by GEX and is accepted by plaintiffs because it presents the only clear record of Epps' status with GEX.

³The amount of \$35.75 indicated as "due" was Epps' regular August monthly payment, the due date for which had not passed on on August 9, 1970.

On February 1, 1969, plaintiff Paul Parham purchased a table, four stools, and a bed from defendant Sears, Roebuck and Company at a cost of approximately \$400. App. at 71. At the time of purchase, Parham signed a contract entitled SECURITY AGREEMENT, by which he agreed that Sears would retain "title" to the merchandise and that upon any default Sears could "repossess" the merchandise. *Id.* at 72.

Having lost his job, Parham fell behind in his payments in early 1970. He did attempt periodically to remit a portion of his meagre income to Sears, and in fact paid \$25.00 in August, 1970, and \$20.00 in September, 1970, on his account, bringing the balance down to \$154.47. Id. at 73.

Despite that his September payment was accepted by Sears, on September 15, 1970, two deputy sheriffs appeared at his home with a writ of replevin directing them to seize the table, stools, and bed. Id. at 17-18. Plaintiff Ellen Parham admitted the deputies only after they exhibited the writ to her and informed her that they were empowered to seize the goods. Id. at 68. No notice of this action was provided to the Parhams before the seizure. The only prior communications from Sears were notices dunning the Parhams for payment. No complaint was filed by Sears at this time or at any later time, and Sears' right to seize and retain the goods has never been adjudicated. Forced onto welfare because of Mr. Parham's unemployment, the Parhams have been unable to replace the necessary household goods seized. The procedure followed by Sears was, again, entirely proper under Pennsylvania replevin statutes and rules.

Plaintiff Rosa Bell Andrews Washington was divorced from defendant Lewis Washington in early September, 1970.4

ASince defendant Washington appeared pro se no stipulation was effected regarding the Washington fact situation. In the opinion below, the court states at n. 2 (App. at 89) that "There has been no stipulation as to defendant Washington. However his uncontradicted testimony establishes that the property replevied, . . . was owned by him and used by his son, of whom he had custody following divorce proceedings and separation from his wife (See transcript of proceedings on September 25, 1970). He recovered only that which was his

There was a contest over custody of their eleven-year-old son, the parties having reached a consensus that their fouryear-old daughter would remain with her mother.

Before any custody order was entered, Mr. Washington seized the boy and, being a deputy sheriff familiar with court papers, filed a praecipe for a writ of replevin against his former wife and her sister, with whom she resided, to seize a bed, two dressers, a cabinet, several of the boy's toys. and his clothes. On September 14, 1970, Mr. Washington himself and two other deputy sheriffs issued the writ and seized the property. Not content with seizing only items used by his son, Mr. Washington also seized a cabinet and a dresser which admittedly had been used by the daughter in the Washington's household prior to the dissolution of their marriage. App. at 29. No notice was provided to Mrs. Washington prior to this seizure. As a welfare recipient, Mrs. Washington has been able to replace the dresser and cabinet seized from her. Mr. Washington has never filed a complaint to establish his right to the goods seized and no adjudication has ever been made confirming his right to them

A description of the operation of replevin in Pennsylvania is provided in stipulations by the parties and findings of the court below. To commence a replevin action in Pennsylvania, the following and the following only need be filed: (1) An entry of appearance; (2) A praecipe (direction) to the prothonotary requesting him to issue such a writ; (3) An affidavit of the value of the property to be replevied; and (4) A bond in double the value amount cited in the affidavit. App. at 90; Pa. R.C.P. 1073(b) (Appendix "A" at 8-9).

for use by his son living with him." The court below erred in two respects here. First, there was no decree of custody at the time of the replevin or even at the hearing date of September 25, 1970. Secondly, defendant Washington himself testified that part of the property seized had been used by the daughter in the Washington household prior to its dissolution. See Text and citation infra.

Upon receipt of the foregoing, the prothonotary forthwith issues a writ of replevin to the sheriff, directing him to seize the property cited in the praecipe. The prothonotary is not authorized to examine the merit of the writ plaintiff's claim and in fact only assures himself that the proper papers have been filed. App. at 90. He provides no notice to the writ defendant. Id. The sheriff, upon receiving the writ, merely executes upon it. He too may not examine the merit of the writ plaintiff's claim and does not do so. Id.

After seizure the sheriff must retain custody of the property for seventy-two hours. App. at 91; Pa. R.C.P. 1077. (App. "A" at 10-11). If no counterbond, in double the value of the property alleged in the writ plaintiff's affidavit, is filed by the writ defendant within the seventy-two hour period, the property seized is turned over to the writ plaintiff. App. at 91; Pa. R.C.P. 1076. (App. "A" at 10). As in the instances of the three named plaintiffs here, the replevin action generally ends at this point. The writ defendant almost never files a counterbond and the writ plaintiff merely retains or disposes of the property seized without ever establishing his right thereto. See pp. 18-19 infra.

Although the rules are silent on the duty of the sheriff to use force if he is repelled in executing this writ, Pennsylvania case law and practice clearly establishes this duty. See pp. 38-39 infra.

Further, the rules fail to provide (1) that a complaint or any other averment of facts by the writ plaintiff need be filed either at the commencement of or at any later time in the proceeding. App. at 96. In none of the foregoing instances was a complaint ever filed; (2) that any notice be given to the writ defendant concerning his right to recovery of the property by posting a counterbond. In fact, the form required by the rules gives no such notice. App. at 91; Pa. R.C.P. 1354.

The plaintiffs' motion for a temporary restraining order was denied by the judge originally assigned to the case as to the class an all named parties except plaintiff Washington. After an ex parte hearing of defendant Washington, this order was vacated.

A three-judge court was convened pursuant to the plaintiff's motion, and the plaintiffs also moved for a preliminary injunction and summary judgment. The prothonotary and sheriff moved to dismiss; GEX and Sears answered, Sears also moving for summary judgment; and Mr. Washington filed no pleadings. After hearings on October 22, 1970, and January 13, 1971, the latter at which the aforementioned stipulations were presented, the court filed an Opinion and Order granting summary judgment to the defendants on March 31, 1971.

On April 8, 1971, plaintiffs Parham and Washington filed a Notice of Appeal to this court with the lower court. On April 26, 1971, these parties submitted their Jurisdictional Statement in this Court along with motions to proceed in forma pauperis and to consolidate this matter with Fuentes v. Shevin, October Term 1970, No. 6060. The Court noted probable jurisdiction on May 24, 1971; granted the plaintiffs' in forma pauperis motion; and set down this case for oral argument immediately following Fuentes.

SUMMARY OF ARGUMENT

Due process of law requires that one be provided with adequate notice and a meaningful opportunity to be heard before he may be deprived of property by the state. Boddie v. Connecticut, ______ U.S. _____, 28 L.E.2d 113 (1971); and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1949). In Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), this Court held pre-judgment wage garnishment unconstitutional on due process grounds, since this procedure provided no notice nor opportunity to be heard to a defendant prior to the time at which he was deprived of his property. The Pennsylvania replevin procedure

analogously violates due process because it permits a prejudgment seizure of one's personal property. The Pennsylvania procedure, moreover, is especially constitutionally deficient because it requires neither that the writ plaintiff commence an action to finally determine his right to the property seized or even allege a claim of right to the said property.

The court below erred in concluding that Sniadach is not controlling because that case is limited to deprivations of wages or media of exchange, such as welfare benefits. Goldberg v. Kelly, 397 U.S. 254 (1970). There is no authority for delimiting the scope of a precept of procedural due process on the basis of the nature of the property taken without due process. See Bell v. Burson, _____ U.S. _ 29 L.E.2d 90 (1971). Furthermore, if the nature of the property taken is limited to certain "specialized" property, numerous cases have held that pre-judgment seizures of personal property of poor persons is equally as "specialized" as the wages garnished prior to judgment in Sniadach. Hall v. Garson, 430 F.2d 430, 441 (5th Cir. 1970); Laprease v. Raymours Furniture Co., 315 F.Supp. 716, 722 (N.D. N.Y. 1970); and Blair v. Pitchess, ___ Cal.3d _ P.2d ____, ___, ___ Cal. Rptr. ____, ___, (Sup. Ct. No. 942-966, opinion filed July 1, 1971) (slip opinion at 32). The court also erred both in its assertion that the deprivation worked by replevin is temporary since the deprivation generally is permanent, and that a temporary taking was not sufficient to violate due process. Cf. Griggs v. Allegheny County, 369 U.S. 84 (1962).

Neither state nor creditor interests exist which give rise to an "extraordinary situation" which would justify retaining replevin irrespective of the hardship worked upon the plaintiffs. The state interest of conserving its financial resources through the avoidance of evidentiary hearings, cited by the court below, is clearly of no consequence. See Shapiro v. Thompson, 394 U.S. 618, 633-35 (1969). The creditor interest in obtaining a debtor's property without the inconvenience of an adversary proceeding, when

balanced against the numerous alternative creditor remedies and the great hardship worked upon the plaintiffs by a permanent seizure of their necessary household goods without due process, is insufficient to justify the procedure. Compare Ownbey v. Morgan, 256 U.S. 94 (1921).

The signing of a security agreement by the debtor does not work a waiver of the debtor's due process or fourth amendment rights of which he is deprived by replevin. Such a waiver of constitutional rights must be effected voluntarily, knowingly, and intelligently. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The purported waiver here is not an understanding waiver, since the security agreements are worded, at best, ambiguously. See Swarb v. Lennox, 314 F. Supp. 1091, prob. juris, noted, 39 U.S.L.W. 3424 (U.S. March 29, 1971) (No. 70-6). Since the security agreement is part of a form adhesion contract, there is no voluntary waiver. Garrity v. New Jersey, 385 U.S. 493 (1967); and Santiago v. McElroy, 319 F. Supp. 284, 294 (E.D. Pa. 1970). Finally, since the waiver is prior to the time when most defenses arise, it is not timely, and hence is neither knowing nor intelligent. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 144-45 (1967); and Chessman v. Teets, 354 U.S. 156, 162-63 (1957).

The Pennsylvania statutes are, moreover, not drawn so narrowly as to protect only secured parties or even creditors. This factor is exemplified by the case of plaintiff Washington, whose ex-husband, a deputy sheriff, used replevin to forcibly seize several items from her. The Epps and Parham fact situations point out, respectively, that the Pennsylvania replevin procedures are readily subject to abuse by creditors regarding, respectively, the scope of security agreements and debtor reliance on previous acceptance of payments. The court below erred in focusing on the facts of the Parham case to the exclusion of the facts of the cases of the other named plaintiffs and of the operation of the statutory scheme challenged in general. See Coe v. Armour Fertilizer Works, 237 U.S. 413, 423-24 (1915).

The Pennsylvania replevin procedure also violates the plaintiffs' fourth amendment right to be free from unreasonable searches and seizures. The fourth amendment clearly applies to civil proceedings, as it was enacted principally to assure the privacy and sanctity of the home. Camara v. Municipal Court, 387 U.S. 523 (1967); Weeks v. United States, 232 U.S. 383, 391-92 (1914); and Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722 (N.D. N.Y. 1970).

Despite lack of express authority for the sheriff to break and enter to execute upon a writ of replevin in the Pennsylvania replevin rules, case law (e.g., Commonwealth v. Temple, 38 D. & C. 2d 120 (Centre County O.S. 1965)) and an accompanying affidavit (App. "C") establishes that he is required to forcibly enter if resisted and in fact does do so. Even if the sheriff did not break into their homes, the named plaintiffs have been subjected to forcible seizures because the force of law mandated that they permit the sheriff to enter. See Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968). Since the writ plaintiff never need file a complaint or allege a claim of right before any judicial official empowered to examine the merits of his claim, the Pennsylvania replevin search and seizure is without prior determination of probable cause by a magistrate. See Blair v. Pitchess, ___Cal.3d ____, ____, P.2d ____, Cal. Rptr. ____, ____, (Sup. Ct. No. 942-966, opinion filed July 1, 1971) (slip opinion at 26). The search and seizure are therefore not reasonable.

ARGUMENT

I

SINCE THE PENNSYLVANIA REPLEVIN PROCEDURE PERMITS THE SEIZURE OF AN INDIVIDUAL'S PERSONAL PROPERTY BY STATE OFFICERS PRIOR TO THAT INDIVIDUAL'S HAVING BEEN GIVEN NOTICE OF THE SEIZURE AND AN OPPORTUNITY TO PRESENT ANY DEFENSES, IT IS VIOLATIVE OF DUE PROCESS OF LAW ON ITS FACE.

A. Since Replevin Authorizes a Pre-Judgment Seizure of Any of an Individual's Personal Property, It is Violative of Due Process on Its Face.

Due process of law requires that, before one may be deprived of any of his property, he be provided with adequate notice and an opportunity to be heard in defense of his right to his property. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164-65 (1951) (Frankfurter, J., concurring); and Roller v. Holly, 176 U.S. 398, 409 (1900). The notice requirement, as set out in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1949), demands

notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

See also Armstrong v. Manzo, 380 U.S. 545, 549-50 (1965). Armstrong also establishes, at 552, that the opportunity to be heard must be "at a meaningful time and in a meaningful manner." In Boddie v. Connecticut, _____ U.S. ____, 28 L.E.2d 113, 119 (1971), this Court further clarified this point when it stated, regarding due process, that

its root requirement [is] that an individual be given an opportunity or a hearing *before* he is deprived of any significient property interests,... See also Bell v. Burson, _____ U.S. ____, 29 L.E.2d 90 (1971); and Goldberg v. Kelly, 397 U.S. 254 (1970).

The opinion of this Court enunciating these principles which is most closely factually analogous to this case is Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). That case involved a due process challenge of a Wisconsin statute permitting garnishment of the wages of a defendant in a lawsuit at the commencement of the action and prior to the entry of any judgment against him. In finding that a freezing of the defendant's wages by the Wisconsin procedure deprived the wage earner "of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have," 395 U.S. at 339, the Court concluded, at 342:

Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. Coe v. Armour Fertilizer Works, 237 U.S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

In several respects, the Pennsylvania replevin procedure is more objectionable than the Wisconsin procedure before the Court in Sniadach and the procedures challenged in the other cases cited. To obtain garnishment there, the Wisconsin plaintiff was required to commence an action and file, with a court, allegations entitling him to the property of the defendant. Here, the plaintiff need only file his entry of appearance, the bond and accompanying affidavit, and a praecipe with the court clerk (prothonotary). Moreover, the clerk has no discretion in denying the issuance of the writ, as would a judge. Also, the property seized under the Pennsylvania procedure is "frozen" for only three days, and then is turned over to the writ plaintiff. Having obtained the property, the plaintiff almost without exception proceeds no further and retains or disposes of the property as he sees fit without ever establishing his right to it.

In contrast to the procedures challenged in Mullane and Armstrong, the Pennsylvania replevin procedure provides no

notice whatsoever to the writ defendant prior to depriving the latter of his property. Indeed, the element of surprise is, for the writ plaintiff, the most attractive feature of this procedural device. As in *Bell* and *Goldberg*, this case challenges a procedure which authorizes a seizure of property before the defendant has had any meaningful opportunity to be heard. Unlike the *Bell* procedure, however, he receives no hearing whatsoever prior to seizure and, unlike the procedure challenged in *Goldberg*, he is assured no hearing even after the seizure.

In light of the foregoing, it is hardly surprising that, in Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D. N.Y. 1970), and Blair v. Pitchess, ____ Cal. 3d ____, P.2d ____, ___ Cal. Rptr. ____ (Sup. Ct. No. 942-966, opinion filed July, 1, 1971), analogous New York and California procedures were struck down on due process, as well as fourth amendment, grounds. These decisions are of course adverse to the decision in Fuentes v. Faircloth, 317 F.Supp. 954 (1970), prob. juris. noted sub nom. Fuentes v. Shevin, 39 U.S.L.W. 3359 (U.S. Feb. 22, 1971) (No. 6060). However, the New York procedure invalidated in Laprease (N. Y. CIVIL PRAC. LAW. § 710(a) (McKinney 1963)) and the California procedure invalidated in Blair (CALIF. CODE OF CIVIL PROC. §§ 509-21 (West 1954)) as well as the Florida provisions challenged in Fuentes (FLA STATS. ANN. §§ 78.01, 78.08 (1971 Supp.)) require that a complaint be filed against the defendant contemporaneously with the writ.5 The Pennsylvania procedure requires neither that an adjudication of the parties' rights to the property be commenced by the writ plaintiff nor that the writ plaintiff even allege the grounds of his claim.

⁵Another recent case refusing to overturn replevin statutes, Brunswick Corp. v. J. & P., Inc., 424 F.2d 100 (10th Cir. 1970), can be similarly distinguished. The Oklahoma statutes in question in Brunswick require that the plaintiff allege that he is the owner of the property or has a special ownership or interest therein, that he is entitled to immediate possession, 12 OKLA. STATS. ANN. § 1572 (1961), and that a summons giving notice of the commencement of an action must issue. Id. at § 1575.

B. The Court Below Erred in Delimiting the Scope of Sniadach and Goldberg to Prejudgment Seizures of Wages and Welfare Benefits Since the Deprivation of Property Worked by Replevin is Neither Less Serious Nor Less Permanent Than Prejudgment Wage Garnishment.

The court below recognized that "there are broad and general similarities" between Sniadach and Goldberg and the case before it. App. at 97. However, it relied heavily on Mr. Justice Douglas' statement in Sniadach, at 340, that, "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." In finding that wages and welfare benefits are unique and "more than mere property" because they alone cannot be replaced, like other property, App. at 97, the court below read Sniadach in a manner which numerous other courts have expressly repudiated.

The due process challenge here, as in *Sniadach*, is procedural in nature. In a procedural question, the significance of such subjective elements as the nature of the property seized without due process is not significant; it is the procedure utilized which is the subject of challenge. *See* Comment, 55 MINN. L.REV. 634, 637-38, 647 (1971).

Such a reading of Sniadach explains the result in Goldberg v. Kelly, 397 U.S. 254 (1970), where this Court struck down a statutory scheme permitting the suspension of welfare benefits prior to a hearing. This reading is also supported by the result in Bell v. Burson, _____ U.S. ____, 29 L.E. 2d 90 (1971). In that case, this Court held that state provisions permitting the suspension of the license of an uninsured motorist after an accident prior to a hearing on the motorist's liability violated due process of law. The fact that wages, or welfare benefits, or a driver's license has been seized by the state prior to hearing has hence been held to be of no consequence. The fact that this case concerns a seizure of personal property, as opposed to wages,

prior to hearing should likewise be held constitutionally insignificant.

Cases stating expressly that the nature of property seized is not in any degree determinative include Lebowitz v. Forbes Leasing & Finance Corp., 326 F.Supp 1335, 1341-48 (E.D. Pa. 1971) (seizure of corporate property through foreign attachment) (dictum); Klim v. Jones, 315 F.Supp. 109, 122. (N.D. Cal. 1970) (seizure of tenant's personal property by landlord); and Larson v. Fetherston, 44 Wis.2d 712, 718, 172 N.W.2d 20, 23 (1969) (pre-judgment garnishment of bank accounts).

Many cases, while refusing to adopt the reasoning of Lebowitz, Klim, and Larson that the nature of the property seized is of no significance whatsoever, have held that seizures of personal property of poor persons present the same distinct problems in our economic system as pre-judgment garnishments of wages. In Hall v. Garson, 430 F.2d 430, 441 (5th Cir. 1970), which concerned a landlord's seizure of a tenant's personalty, the Fifth Circuit Court of Appeals points out that

the same kind of deep personal hardship can result from the seizure of personal and household goods as resulted from the garnishment of wages under the Wisconsin statute in *Sniadach*.

In Santiago v. McElroy, 319 F.Supp. 284, 293 (E.D. Pa. 1970), a three-judge court held seizure of tenants' personal property "indistinguishable" from the seizure of wages in Sniadach. Other cases supporting an identical application of Snaidach include, e.g., Osmond v. Spence, ____ F.Supp. ___, 39 U.S.L.W. 2660 (D. Del. May 13, 1971); Swarb v. Lennox, 314 F.Supp. 1091 (1970), prob. juris. noted, 39 U.S.L.W. 3424 (U.S. March 29, 1971) (No. 70-6); and Jones Press, Inc. v. Motor Travel Services, Inc., ____ Minn. ___, 176 N.W.2d 87, 90 (1970).

The cases most clearly on point are Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D. N.Y. 1970); and Blair v. Pitchess, ____ Cal. 3d ____, ___ P.2d ___, __ Cal. Rptr. ____ (Sup. Ct. No. 942-966, opinion filed July 1, 1971).

These cases concerned challenges of the New York replevin and California claim and delivery laws, respectively, both of which procedures are analogous to the Pennsylvania provisions challenged here. Both relied upon Sniadach in reaching their respective conclusions that the procedures challenged violated procedural due process. The Laprease court, addressing itself directly to the issue raised by the court below here, stated at 722:

Beds, stoves, mattresses, dishes, tables, and other necessaries for ordinary day-to-day living are, like wages in *Sniadach*, a "specialized type of property presenting distinct problems in our economic system," the taking of which on the unilateral command of an adverse party "may impose tremendous hardships" on purchasers of these essentials.

It is urged, therefore, that this Court focus upon the fact that the Pennsylvania replevin procedures permit a seizure

⁶Most of the law review material commenting upon the result in Laprease has applauded its result. See Note, 35 ALBANY L. REV. 370 (1971); Comment, 55 MINN. L. REV. 634 (1971); Note, 24 VANDER-BILT L. REV. 155 (1970); and Note, 19 U. KAN. L. REV. 281 (1971). But see Comment, Laprease and Fuentes: Replevin Reconsidered, 71 COLUM. L. REV. 886 (1971). The Albany note concludes, for example, that "What is surprising is that such a decision was not made some years ago. . . . But . . . [m] ost actions involving pre-judgment seizures of chattels involved the poor who were not able to muster enough backing to fight such a procedure. It was not until the late 1960's that federal funds became available to the legal aid societies, thus enabling them to expand their mode of operation so as to make themselves more readily available to those who could not afford to contest such an action." 35 ALBANY L. REV. at 377.

The University of Kansas note also considers Fuentes at some length and criticizes its result. 19 U. KAN. L. REV. at 293-95.

of property prior to notice and a hearing rather than the nature of the property seized. However, should the Court find that the nature of the property seized is significant, it is alternatively urged that the property seized here is equally as "specialized" as the property seized in *Sniadach* and that *Sniadach* therefore applies to the instant fact situation.

The record of this case presents clear evidence of the tenability of the latter assertion. Appellants Parham and Washington are welfare recipients. Their economic status is hence more precarious than the wage-earner considered in Sniadach. Their welfare benefits provide them with the bare minimum for sustenance. There is no opportunity to budget extra funds and save to repurchase the table and bed and clothes cabinets, respectively, that have been seized from them. Therefore, they will be financially incapable of replacing this property. They simply must do without it. Clearly, the seizure of necessary household goods is equally and perhaps more capable of "driving a poor family to the wall" than pre-judgment wage garnishment.

The court below, in harmonizing its analysis of Sniadach with Goldberg states that "[w]elfare benefits there were the equivalent of the 'wages' earned' because both are "the medium of exchange through which to obtain the day's needs." App. at 98. Admittedly, the seizure here is not a seizure of a medium to obtain daily needs. It is a seizure of property itself serving daily needs that can be acquired through these media. The seizure of such property should certainly rise to the level of the seizure of the medium through which it is acquired.

In addition to focusing upon the nature of the property seized here, the court below also asserts that, since the taking by replevin is a "temporary dispossession" of the property, an opportunity to be heard at a subsequent time is adequate to prevent a deprivation of the plaintiffs' property without due process. App. at 100-01.

Replevin is theoretically a provisional remedy, i.e., a remedy granting temporary relief to a certain party pending

final disposition. However, many provisional remedies have, with increasing frequency, been utilized by creditors to obtain complete relief. A seizure having been made, the creditor has succeeded in his purpose of obtaining the consumer's goods and the action is, in most cases, ended. No ultimate hearing on the merits is pursued. See Comment, Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp: A Constitutional Fly in The Creditor's Ointment, 34 ALBANY L.REV. 426, 427-29 (1970).

The finality of a provisional remedy is well exemplified by the Pennsylvania replevin procedure. The creditor need file no complaint, and the consumer is never summoned. The consumer's only method of retaining his property is by filing a counterbond in double the value of the property seized. However, this expense burden is so great as to be prohibitive for the typical writ defendant. See Santiago v. McElroy, 319 F. Supp. 284, 289 para. 17 (E.D. Pa. 1970). Moreover, the writ form does not apprise him of the right to recover his property by filing a counterbond.

The consumer's only means of forcing the creditor to proceed to finality is the filing of a praecipe under Pa. R.C.P. 1037(a). However, the consumer is never apprised of this requirement and must hire an attorney to be so apprised. It is not surprising then, that most Pennsylvania replevin actions, as in the cases of the named plaintiffs here, end at the provisional seizure of property. Furthermore, during the pendency of the outcome of any subsequent proceeding, the goods are retained by the creditor. The consumer is therefore deprived of his property in any event, at least for a substantial temporary period.

⁷JUDGMENT UPON DEFAULT OR ADMISSION. ASSESSMENT OF DAMAGES. If an action is not commenced by a complaint, the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros.

The argument of the court below that a temporary dispossession of property does not effect a taking also disregards the teaching of Mr. Justice Harlan's concurring opinion in Sniadach, 395 U.S. at 342-44. Even were the deprivation temporary, there is, nevertheless, a deprivation of the use of the property replevied prior to an opportunity for the consumer to be heard. See Blair v. Pitchess, ____ Cal. 3d ___, ___, __ Cal. , ___, __ Cal. Rptr. ___, __, (Sup. Ct. No. 942-966, opinion filed July 1, 1971) (slip opinion at 28-29). See also Griggs v. Allegheny County, 369 U.S. 84 (1962); and United States v. Causby, 328 U.S. 256 (1946) (temporary takings of property by the Government or State without due process of law are unconstitutional).

The seizure here is certainly no less permanent than the Sniadach seizure. There, the seizure preceded a lawsuit that would ultimately try the merits of the creditors' claim. Here, the creditor need not commence a lawsuit to determine his ultimate right to the goods—nor even allege a claim of right prior to seizure. Hence, the seizures of the Parhams' table and bed and Mrs. Washington's cabinet and dresser are, for all practical purposes, permanent takings of this property without these parties' having had any day in court whatsoever.

C. The Court Below Erred in Finding That State and Creditor Interests Found Not to be Present in *Sniadach* Render That Case Distinguishable From the Instant Case.

In Sniadach, the Court recognized, at 395 U.S. 339, that "summary procedure may well meet the requirements of due process in extraordinary situations." The court below, App. at 101-02, found several state and creditor interests present here which it deemed constituted "extraordinary situations" justifying the perpetuation of replevin.

The principal state interest found by the court below is that "summary seizure conserves State financial resources and administrative time in reducing the number of eviden-

tiary hearings in a given lawsuit." App. at 101. This argument appears based on the erroneous presumption that there will ever be any evidentiary hearing in the typical replevin suit. It also presumes that a savings in the state coffers and court time justifies a denial of individuals' due process rights. In Boddie v. Connecticut, _____ U.S. ____, 28 L.E. 2d 113, 121 (1971), this Court, in upholding a due process right to first access to state courts for divorce actions, rejected a similar argument despite the fact that this holding promulgated additional litigation in state courts. No such additional litigation is created here, since the hearing would be pursuant to an already-pending state proceeding. This Court has also emphasized that even a substantial saving of state financial resources does not create an "extraordinary situation" justifying a state's denial of fourteenth amendment rights to its citizens. See, e.g., Shapiro v. Thompson. 394 U.S. 618, 633-35 (1969).

The Government and state interests present in the cases cited in *Sniadach* and *Boddie* as exemplifying "extraordinary situations" are clearly distinguishable from the state interest found by the court below to be present here. These cases touched upon such matters as the war power, national security, or government regulation of a certain type of business in the public interest.⁸ The state interest found by the

⁸The cases cited in *Sniadach* and *Boddie* are *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961) (dismissal of short-order cook working in Naval Gun Factory without hearing); *Ewing v. Mytinger & Castleberry, Inc.*, 339 U.S. 594 (1950) (summary seizure of allegedly mis-branded drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (appointment of conservator to federal savings and loan association); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent controls established in defense-rental areas during war without landlords' hearing); *Yakus v. United States*, 321 U.S. 414 (1944) (maximum rates for beef sale during war without hearing to sellers); and *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928) (lien on bank stockholders' property prior to hearing).

Also within this line of cases is *Den ex dem. Murray's Lessee* v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856). This case is cited by the court below as authority in both its due process (App. at 99, 100) and fourth amendment (Id. at 104) arguments. However,

court below here is therefore almost identical to that present in *Sniadach* and *Boddie* and hence is not "extraordinary" within the *Sniadach* meaning of that term.

There is of course a creditor interest served by the Pennsylvania replevin procedure. Not having to allege or prove his case, a creditor can very easily seize his debtor's property. However the interest in providing such a swift and easy remedy to creditors must be balanced against the hardships which such a procedure works upon writ defendants. Only where the creditor's interest clearly outweighs such hardship is an "extraordinary situation" possibly justifying a procedure such as replevin present.

Such an extraordinary situation may arise when there are no practical alternative remedies available to creditors. When the defendant is absent from the jurisdiction and a provisional remedy for the creditor is necessary to assure the defendant's presence in court, an extraordinary situation may well be present. In Ownbey v. Morgan, 256 U.S. 94 (1921), for example, an action in which a defendant unsuccessfully challenged a foreign attachment law, such a creditor interest was arguably present. The attachment was necessary to assure that the defendant, a non-resident, would appear in court. But see Lebowitz v. Forbes Leasing & Finance Corp., 326 F.Supp. 1335 (E.D. Pa. 1971); and Mills v. Bartlett, 265 A.2d 39 (Del. Super. 1070), rev'd on other grounds sub nom. Mills v. Trans Caribbean Airways, Inc., 272 A.2d 702 (Del. 1970). This reasoning also explains the Court's per curiam affirmance in McKay v. McInnis, 279 U.S. 820 (1928), an unsuccessful challenge of Maine's pre-judgment attachment law. The lower court opinion, McInnis v. McKav. 127 Me. 110, 141 A. 699 (1928), indicates that the defendant appeared specially and

this case involved a summary procedure whereby the Government was empowered to dispose of the property of an errant treasury official. It held that a party who had purchased the property of a Collector of Customs which had been summarily seized after the Collector's embezzlement could not be ejected from the property.

hence was in all likelihood a non-resident challenging in effect a foreign attachment. Ownbey and McKay are further distinguishable because attachment is a procedure effected in an action which will ultimately determine the parties' rights to the property attached.

Alternatives not infringing upon their debtors' due process rights are present for creditors. They could commence an action in assumpsit against their debtor for the amount due. This would permit them to acquire a personal judgment which they could use as a basis for execution upon all of their debtor's property. If they desire to recover particular merchandise in specie, they could either repossess the property or commence an action of replevin without bond. Balancing these alternatives against the hardship worked upon the debtor by the immediate, forcible seizure of his necessary personal property effected by replevin clearly shows the lack of an extraordinary creditor interest justifying replevin here. The California Supreme Court, in Blair v. Pitchess, Cal.3d . P.2d ____, Cal. Rptr.

(slip opinion at 32), concludes that the balance tips thusly:

However substantially claim and delivery procedure may protect the creditor's interest and indirectly promote the state's interest in business and commerce, it seems to us that such advantages are far outweighed by its detrimental effect upon those whose goods are seized. The removal of personal property, like the garnishment of wages, in many cases imposes tremendous hardship on the defendant and his family and gives the plaintiff unwarranted leverage.

See also Klim v. Jones, 315 F. Supp. 109, 124 (N.D.Cal. 1970).

The court below suggested, App. at 102, an additional creditor-interest argument: that retention of the "adequate and practical remedy" of replevin is to the benefit of debtors, for without it credit would dry up. As discussed above, however, replevin is merely the most oppressive of

a plethora of creditor remedies. There is no evidence that replevin is vital for preservation of credit, and in fact the record would indicate the opposite. Defendant Sears indicated that it suspended the use of this remedy after the commencement of this lawsuit (App. at 60), and failed to present any proof of subsequent profit reduction or disinclination to advance credit as a result of their doing so.

The court below also continually referred to the "title" and security interest retained by a creditor who uses replevin to justify its finding that an extraordinary situation existed here. App. at 101, 105. Initially, it should be pointed out that the Pennsylvania replevin rules make no reference to a prerequisite that title or a security interest be held by the writ plaintiff. See pp. 29-34 infra. However, assuming arguendo the significance of title or a security interest, any meaning that can be attached to these terms must be gleaned from the Uniform Commercial Code, which Pennsylvania has adopted.

As 12A P.S. \$2-401 and the accompanying notes make clear, the concept of "title" is of little or no significance. Section 2-401(1), in fact, states:

Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest . . .

Therefore, our consideration of the significance of these terms must be directed solely to Article 9 of the Code, which deals with security interests.

Article 9 of the Code provides that the secured party may proceed "by any available judicial procedure." 12A P.S. §9-501(1). More specifically, it permits the secured party to take possession either by "action" or "without judicial process if this can be done without breach of the peace," i.e., by repossession. 12A P.S. §9-503(1). The following subsection, 12A P.S. §9-503(2), moreover, states:

If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise. Several comments upon this language of §9-503(2) are appropriate. First is the rather obvious point that, when the Code conflicts with the constitutional requirement of due process of law, the Code must yield. Secondly, the Code provides alternative remedies for the secured party besides replevin-with-bond, underscoring the alternatives available to the creditors. Thirdly, the Code's reference to replevin is ambiguous. It may be referring only to replevin-without-bond, a conclusion that would appear consistent with the alternatives of either repossessing or proceeding by "action" recited in §9-503(1). "Action" is defined in 12A P.S. §1-201(1) as

a judicial proceeding [which] includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

Since the writ plaintiff need not even allege a claim of right under Pennsylvania replevin procedure and no final adjudication upon his rights is forthcoming, it might be argued that replevin-with-bond is not an "action" within the Code's definition of that term.

Therefore, the references of the court below to the "title" or security interest of the replevin writ plaintiff are merely the employment of empty phrasology to bolster its opinion. The retention of "title" or a security interest does not advance the argument that an "extraordinary situation" is present which justifies the continued existence of replevin. Neither is the state interest found by the court sufficient to manifest an "extraordinary situation." On the other hand, the writ defendant frequently suffers an immediate and permanent deprivation of necessary household goods before there is ever a court determination that he is not entitled to retain these goods. This balance clearly favors the consumer and works against a retention of replevin.

D. The Signing of an Installment Contract Granting to a Creditor a Security Interest or Some Other Interest in Goods Purchased Under the Contract Does Not Effect a Waiver of Due Process or Fourth Amendment Rights by a Consumer—Debtor.

Plaintiffs Epps and Parham, as noted in the previous section, signed contracts granting to their creditors "title" and a security interest in the goods purchased. Although the court below did not address the issue of potential waiver of due process rights worked by these contracts, it did suggest that waiver of fourth amendment rights was an issue. App. at 104. Moreover, the waiver argument was persuasive to the *Fuentes* court. Since the court below found no violation of due process or fourth amendment rights, it was never necessary for it to confront the issue of waiver. However, this is an issue which must be successfully confronted by the plaintiffs if they are to ultimately prevail.

The issue of waiver is of great importance in consumer law because, due to the unequal bargaining power of seller-creditor and consumer-debtor, the former will frequently be able to extract very comprehensive waivers from the latter as a matter of course. One court has even suggested that pre-judgment wage garnishment may be effectuated and Sniadach entirely overcome by express contract provision. See Young v. Ridley, 309 F. Supp. 1308, 1312 (D. D.C. 1970). Hence, this Court must place a heavy burden on the seller-creditor alleging a waiver of due process or any other rights in a consumer-credit transaction.

Such an approach is consistent with the long-standing rule of this Court that there is a presumption against the waiver of constitutional rights. A waiver, to be effective, must be made knowingly, intelligently, and voluntarily. Brookhart v. Janis, 384 U.S. 1, 4 (1966); and Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The security agreements of plaintiffs Epps and Parham, it is submitted, are typical of those signed by most consumer-debtors. Both provide that the secured party shall

retain "title," which, as discussed supra, is merely another way of stating that the creditor retains a security interest in the merchandise purchased. Epps' contract authorizes GEX to "retake" the merchandise; the Parhams contract authorizes Sears to repossess the goods. Neither contract mentions the term "replevin" and neither describes a procedure akin to replevin, i.e., permitting forcible seizure of the goods without notice. A reasonable interpretation of the Parham-Sears contract is that, from the express authorization to repossess, an absence of authority to replevy makes such a right contrary to the terms of the contract. The authority to "retake" cited in the Epps-GEX contract is ambiguous. Since GEX is the party which has drawn up the contract, however, such an ambiguity should be interpreted in favor of Epps and, like the Parham-Sears contract, to authorize repossession only.

It is extremely unlikely that the Parhams and Epps understood that they were waiving the due process rights which replevin violates when they signed their respective purchase contracts. The failure of a contract signatory to understand a waiver of due process rights has been held sufficient to overcome a claim of waiver of due process in two confession of judgment cases, Osmond v. Spence, ____ F. Supp. ____, 39 U.S.L.W. 2660 (D. Del. May 13, 1971); and Swarb v. Lennox, 314 F. Supp. 1091 (1970), prob. juris. noted, 39 U.S.L.W. 3424 (U.S. March 19, 1971) (No. 70-6). Moreover, the confession clauses considered in those cases, while termed in legal jargon, expressly granted power to confess to the creditor. The contracts here, far from granting the creditor a right to replevy, could be interpreted as denying the creditor this right.

There are two other reasons why the purported waivers here are ineffectual. First, such "waivers" constitute an adhesion contract and hence are not voluntary. The Court, in such cases as Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); Garrity v. New Jersey, 385 U.S. 493, 498 (1967); and Miranda v. Arizona, 384 U.S. 436, 476 (1966),

has emphasized the significance of the element of voluntariness in considering waivers of constitutional rights.

The significance of voluntariness in this context is emphasized by the holdings in Santiago v. McElroy, 319 F. Supp. 284, 294 (E.D. Pa. 1970) (three-judge court); and Blair v. Pitchess, ___ Cal.3d ___, __ P.2d ___, __ Cal. Rptr. __ (Sup. Ct. No. 942-966, opinion filed, July 1, 1971). Santiago declared rent distraint unconstitutional in Pennsylvania. The defendants in that case contended that clauses in form leases entitling the landlord to use distraint and waiving all other statutory protections afforded to tenants worked a waiver of the tenants' due process rights. The court rejected this contention, finding that the form leases were "put before tenants on an 'except this or get nothing' basis." In Blair, the court observed that most retained title and collatieral security agreements were adhesion contracts that could not work a waiver of constitutional rights. ___ Cal.3d at P.2d at ____, ___ Cal. Rptr. at ____ (slip opinion at 24-25). Likewise, the plaintiffs here had no choice but to sign a contract containing a security agreement or to do without needed consumer goods. See also Shuchman, Consumer Credit by Adhesion Contract, 35 TEMP. L.Q. 125 (1962)

Any purported waiver is also ineffectual because it was not timely and hence not knowing and intelligent. The waiver was allegedly effected at the time that the contract was signed. This point in time is long prior to that when most defenses of the consumer arise, such as breaches of warranties and disputes in payments. At the time that he purchased his time payment account goods, Mitchell Epps could have hardly perceived that they could be forcibly seized for delinquencies on other accounts. He could hardly be said to have waived the right to raise this defense when he signed his time payment contracts, because the possibility of these consequences probably never entered his mind at that time. Likewise, the Parhams can hardly be said to have waived, at the time that they signed their contract,

their right to show the court that they were making payments on their account and should not have been subject to forcible seizure of the goods purchased. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130, 144-45 (1967) (failure to raise defense unknown to defendant does not waive unknown defense); Chessman v. Teets, 354 U.S. 156, 162-63 (1957) (waiver at early stage in proceeding does not carry over to latter stage in proceeding); and United Firemen's Insurance Co. v. Thomas, 82 F. 406, 409 (7th Cir. 1897) (alleged waiver at time of signing contract not operative where not made with knowledge or intent to waive rights).

The same considerations can be raised regarding any potential waiver of fourth amendment rights. However, one point makes the contention that fourth amendment rights have been waived even more tenuous. Any purported consent to search the writ defendant's home and seize merchandise purchased on credit is given only to the seller-creditor. There is no authorization granted to government officials to forcibly enter the writ defendants' home to search it and seize this merchandise. See Blair, ___ Cal.3d at ___, __ P.2d at ___, __ Cal. Rptr. at ___ (slip opinion at 24). Therefore, there is neither a waiver of due process nor fourth amendment rights worked by the consumerdebtor's signing of a security agreement.

E. Since the Pennsylvania Replevin Statutes Are Not Narrowly Drawn To Meet Extraordinary Situations, They Are Violative of Due Process on their Face.

After its Sniadach declaration that provisional remedies may meet due process in certain extraordinary situations, this Court states, at 395 U.S. 339:

But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition.

The requirement that a statute potentially working a deprivation of due process be narrowly drawn is also considered in Osmond v.-Spence, ___ F. Supp. ___, 39 U.S.L.W. 2660 (D. Del. May 13, 1971) (slip opinion at 18); Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 723 (N.D.-N.Y. 1970); and Blair v. Pitchess, ___ Cal.3d ___, __, __ P.2d ___, __, __ Cal. Rptr. ___, __ (Sup. Ct. No. 942-966, opinion filed, July 1, 1971) (slip opinion at 28).

The court below here erred in two respects in this regard. First, it failed to consider the entire record before it in almost its entire discussion. Almost every statement that the court makes relates to the Parham fact situation, ignoring the Epps and particularly the Washington fact situations. Secondly, rather than considering whether the statute is narrowly drawn, it confines itself to discussing the operation of the statute as if it were narrowly drawn, referring to abusive uses, such as the Washington fact situation, as "hypothetical circumstances of undue hardship not presently before the Court." App. at 102.

The Washington fact situation reveals replevin in a context completely removed from that of creditor and debtor. The seizure here is effected only because the writ plaintiff, himself a deputy sheriff, happened to know about replevin. Defendant Washington, after summarily seizing custody of his son, has proceeded to summarily seize personal property in the possession of his former wife belonging not only to his son but to his daughter also.

Any discussion of creditor interests and the enforcement of a security interest of a creditor in this context is clearly inappropriate. As there is no creditor, there is no creditor interest at all. The interest of the state in furthering such an unchecked and arbitrary seizure is also difficult to conjecture.

The Epps fact situation is also glossed over by the court. Nothing in the Epps time payment contracts would appear to create a security interest in the items purchased through these contracts for purchases on Epps' separate revolving

charge account. We do not have the revolving charge contract (if indeed there was any such contract), but even if a security interest were taken in time-payment purchases in that contract, such a security interest was unconscionable and hence unenforcible. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

In its discussion of Laprease, Fuentes, and Brunswick Corp. v. J. & P., Inc., 424 F.2d 100 (10th Cir. 1970), the replevin challenges which pre-dated it, the court below relies heavily on the fact that "default is not denied" here. App. at 103. In fact, however, there is no default in the Washington fact situation and the writ plaintiff's claim of right is denied, even partially, by the writ plaintiff himself. App. at 29. A close examination of the Epps fact situation, moreover, reveals that here there was no default on the contract pursuant to which the goods replevied could have been properly seized. Even the Parham case hardly evinces a clear showing of default, for the Parhams had made recent payments, one of which was accepted by Sears only days before the replevin. The silent acceptance of this payment and the payment in the previous month established Sears' acceptance of a payment schedule. App. at 73.9

[&]quot;Most of the replevin cases have commented at length upon whether the particular named parties were "in default" to their creditors when their property was replevied. The court below, emphasizing the significance of "default," states: "Thus, the instant case, where default is not denied, is closer to Brunswick and on the theory advanced by the Laprease court, we might well follow Brunswick." App. at 103. It is submitted that in fact whether the named parties were "in default" is hardly a proper ground for distinguishing these cases and has not in fact actually been a ground for decision. The Brunswick court was presented with the case of a corporate conditional vendee which claimed that its vendor had converted goods seized under the doctrine of custodia legis. The court, dismissing what appears to have been a make-weight constitutional argument in one paragraph, closes its opinion with emphasis on the vendee's admission of default.

In Laprease, the court had before it a named plaintiff, Beverly Laprease, whom it described as "on welfare and unable to make the required payments." 315 F. Supp. at 719. However, despite this apparent finding of a default by Mrs. Laprease, the court distin-

The Uniform Commercial Code authorizes the creditor to utilize provisional remedies only when the debtor is in "default." 12A P.S. §§ 9-501(1), 9-503(1). But default is a legal term, and there cannot legally be a default until one is admitted or there is determined to be one by a neutral arbitor. By permitting the creditor to proceed to seize whenever he deems that there is a default renders Pennsylvania replevin's constitutionality inadequate.

As the Epps facts exemplify, the creditor's "discretion" controls not only the default, but the scope of the security interest. As the Washington facts exemplify, the writ plaintiff need not have a security interest nor be a creditor to invoke replevin. The simple fact is that all a Pennsylvania resident need do is file a entry of appearance, praecipe, and affidavit of value and post a bond to seize, without notice. anything from anyone for any reason-or for no reason at all. The writ plaintiff may of course be liable on the bond if he is pursued by the writ defendant, but if his victim is someone as poor and powerless as the Parhams and Mrs. Washington, there is little prospect for such retribution. Moreover, the writ defendant, if he cannot post a counterbond, is doomed to deprivation of his property for an indeterminate length of time even if he can afford a lawyer to file a counter-replevin or a praecipe under Pa. R.C.P.

guished Brunswick because a default has been admitted in the latter

In Fuentes, the plaintiff had a clear breach of warranty defense, which would appear to obviate any finding that she was "in default." However, the court there held that any failure to make a payment—even when the consumer had a breach of warranty defense—constituted a "default."

Clearly, whether the named plaintiff is "in default" has not been a controlling circumstance in these cases. The most recent decision, Blair v. Pitchess, properly did not consider whether the named party was in default in rendering its holding of unconstitutionality. Moreover, Blair was a taxpayer's action and did not even include parties to California claim and delivery actions as parties in the lawsuit.

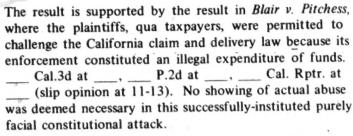
Hence, it is submitted that the court below, in addition to erring by disregarding the Parham and Washington fact situations, has erroneously attached significance to defaults by the named plaintiffs.

1037(a). And if the status quo is not altered through the writ defendant's initiative, he will never have a day in court. Practically, of course, replevin has been and will be chiefly a tool in the hand of the creditor to seize his debtor's property before he is adjudged entitled to it. The poor consumer will be likely to accede passively to the replevin seizure as a manifestation of power from a system against which he can hardly hope to prevail.

The plaintiffs are individuals who have been subjected to substantial abuse from the Pennsylvania replevin procedure. That this procedure is oppressive is thus exemplified by them without resort to hypotheticals not before the Court. Moreover, the plaintiffs have attacked the Pennsylvania replevin provisions as being violative of due process on their face. The cases of Wuchter v. Pizzutti, 276 U.S. 13, 24-25 (1928); and Coe v. Armour Fertilizer Works, 237 U.S. 413, 423-24 (1915), establish that the fact situation of individual plaintiffs before the Court is of less consequence than the statutory provision challenged in such an attack.

Wuchter concerned a challenge of a state statute providing that service on defendant non-resident motorists could be had by service upon the Secretary of State. The Wuchter defendant did receive notice of an action brought against him from the Secretary of State, but was held by this Court to be a proper party in a successful challenge of the statute because the statute failed to mandate that such notice be given. Coe concerned a state statute that permitted a levy against the property of a corporate shareholder without notice after an unsuccessful levy against the corporation. This Court reversed a decision that dismissed the defendant's due process claims because he had actually received notice of the proceeding before the levy and failed to act because he had no defense. It stated, at 237 U.S. 424:

To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits.



Therefore, assuming arguendo that the plaintiffs have not brought individual cases showing sufficient undue hardship before the court below, under the teaching of Wuchter and Coe the court erred in failing to consider abuses to which the Pennsylvania replevin laws, because they are not narrowly drawn, may subject writ defendants.

- II. SINCE THE PENNSYLVANIA REPLEVIN PROCEDURE MANDATES THAT STATE OFFICERS ENTER THE HOME OF AN INDIVIDUAL AND SEIZE THAT INDIVIDUAL'S PROPERTY PRIOR TO ANY JUDICIAL DETERMINATION THAT THE SEARCH AND SEIZURE IS REASONABLE, THIS PROCEDURE IS VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS ON ITS FACE.
 - A. The Scope of the Fourth Amendment Is Not Limited To Criminal and Quasi-Criminal Proceedings.

The fourth amendment's prohibition against unreasonable searches and seizures is most commonly invoked by criminal defendants seeking to suppress evidence obtained against them by the police in illegal searches. However, there was clearly no intent on the part of the draftsmen of the Constitution to limit its application to such cases. In Boyd v. United States, 116 U.S. 616 (1886), the Court analyzed the nature of the amendment and concluded that, historically, its intent was to protect American citizens from all invasions of their privacy by public officials. 116 U.S. at 630.

The reasoning of the *Boyd* court was reiterated in *Weeks* v. *United States*, 232 U.S. 383 (1914). In that case the Court declared, at 391-92:

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon our Federal system with the enforcement of the laws. (emphasis added.)

In See v. Seattle, 387 U.S. 541 (1967); and Camara v. Municipal Court, 387 U.S. 523 (1967), this Court put to rest any lingering doubts that the fourth amendment was applicable to civil matters by reversing contempt charges against defendants who had failed to admit building inspectors. In Camara this Court, at 387 U.S. 530, said:

It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Perhaps an even more definitive statement was delivered by Judge Prettyman in *District of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1949), in response to the argument that the fourth amendment is premised upon and limited by the fifth amendment:

The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men,

not merely to criminals, real or suspected. So much is clear from any examination of history, whether slight or exhaustive. The argument made to us has not the slightest basis in history. It has no greater justification in reason. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.

See also Abel v. United States, 362 U.S. 217, 254 (Brennan, J., dissenting).

The protections of the fourth amendment and its attendant exclusionary rule have been extended to various types of civil proceedings by this Court and other federal courts. These types of cases include forfeiture proceedings, ¹⁰ civil anti-trust actions, ¹¹ civil tax actions, ¹² and a suit by a civilian Government employee seeking back pay. ¹³

This Court has, furthermore, clearly reiterated that the fourth amendment applies to civil matters in several recent decisions. In Wyman v. James, ___ U.S. ___, 27 L.E.2d 408, 413 (1971), the Court stated that "one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior." The Court there refused to hold home visits to welfare recipients violative of the

¹⁰ One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1958).

¹¹ Iowa v. Union Asphalt & Roadoils, Inc., ¹281 F. Supp. 391, 404-11 (S.D. Iowa 1966).

¹²Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), cert. denied, 396 U.S. 986 (1969); and Rogers v. United States, 97 F.2d 691 (1st Cir. 1938).

¹³ Saylor v. United States, 374 F.2d 894 (U.S. Ct. Cl. 1967).

State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907, 910 (1967), has extended fourth amendment protections to juveniles and two other state cases have extended that amendment's scope to cases involving private parties only and not governmental entities. Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958); and Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 662 (Clermont County C.P. 1966).

fourth amendment because neither a search nor unreasonable state action was involved. Here, of course, there is not only a search but a seizure as well. Moreover, the action of state officials here hardly serves the rehabilitative function which the Court held home visits served to welfare recipients.

Also pertinent are the Court's decisions in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, ______ U.S. _____, 91 S.Ct. 1999 (1971); and Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). In Bivens the Court held that the fourth amendment could properly serve to establish a cause of action in a purely civil action for damages. In Griswold the Court, describing the fourth and fifth amendments as a "protection against all government invasion of the sanctity of a man's home and the privacies of life," utilized this amendment as one of the grounds for striking down a Connecticut statute prohibiting the use of contraceptives because said statute invaded the privacy of married persons.

Finally, in Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D. N.Y. 1970); and Blair v. Pitchess, ____ Cal. 3d ___, ___ P.2d ___, ___ Cal. Rptr. ___ (Sup. Ct. No. 942-966, opinion filed July 1, 1971), state procedures closely analogous to the Pennsylvania statutes challenged here were stricken down on fourth amendment grounds. The Laprease court, meeting an argument much like that of the court below in this case held, at 722:

The argument that the Fourth Amendment does not apply, is supported by neither good sense nor law. If the Sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed.

The Blair court, considering See, Camara, and Wyman, concludes that "[t]he teaching of these cases in that the Fourth Amendment applies to civil as well as criminal maters." ___ Cal.3d at ___, __ P.2d at ___, __ Cal. Rptr. at ___ (slip opinion at 18). Finding that "the citizen's

right to privacy is infringed almost as much by such civil
intrusions as by searchers in the traditional context," the
court holds the California statutes violative of the fourth
amendment Cal.3d at, P.2d at,
Cal. Rptr. at (slip opinion at 19).

The Court's analysis that the fourth amendment's chief thrust is the preservation of the privacy of all individuals, whether charged with a crime or not, makes it clear that the fourth amendment protects the right of the poor consumer to be free from unreasonable invasions of his home and seizures of his property by government officials executing civil process. It is submitted, therefore, that the court below erred when it declared that "we are not convinced of the applicability of the Fourth Amendment to the proceedings here in issue, . . ." App. at 105. It does apply. The only real issue is whether the court below also erred in declaring that the seizured involved were not unreasonable.

B. Since the Defendant Sheriff Is Required To Forcibly Enter the Home of the Replevin Writ Defendant and Seize the Property on the Writ Irrespective of the Fact that the Merits of the Writ Plaintiff's Claim Have Not Been Adjudicated, Examined, or Even Alleged by the Writ Plaintiff, the Pennsylvania Procedure Authorizes an Illegal Search and Seizure.

In several passages in its opinion, the court below placed great emphasis on the fact that the Pennsylvania replevin rules make no express statement that the sheriff is required to forcibly execute upon a writ of replevin if he is unable to gain peaceable entry to the writ defendant's home. Appat 90, 103, 104. In so doing, the court not only ignored a plethora of Pennsylvania case law, but also ignored its own finding that

[t]he Sheriff, or his agents, when executing upon a writ of replevin with bond, is required to enter

the home of the defendant on the writ and to seize with or without consent of the defendant any and all property named in the writ. App. at 90. (emphasis added.)

The principal Pennsylvania case is *Jones v. Herron*, 1 Dist. 475, 12 Pa. C.C. 183 (Phildelphia County C.P. 1892). That case holds, at 1 Dist. 476, 12 Pa. C.C. 184, that

in a writ of replevin the command is to take the goods of a plaintiff who has entered security for their return... and, under common law and statute, the sheriff may break outer doors or enter by unusual ways for the purpose of executing on the writ.

The Jones holding is quoted in two criminal cases in which the defendants were convicted of obstruction of legal process for resisting sheriffs executing replevin writs. Commonwealth v. Temple, 38 D. & C. 2d 120 (Centre County Q.S. 1965); and Commonwealth v. Valvano, 33 D. & C. 128 (Lackawanna County Q.S. 1936). Also pertinent is a civil action brought by a writ defendant for illegal entry against a writ plaintiff, the latter of whose agent, at the direction of deputy sheriffs, entered through the writ defendant's window; the court directed a compulsary non-suit on the ground that the entry was lawful. Deford v. May, Stern & Co., 42 York Leg. Rec. 13 (Allegheny County C.P. 1927).

It is conceded that there was neither violence nor breaking and entering by the sheriff's deputies in the executions upon any of the three named plaintiffs. However, there is no evidence on the record which supports the court's finding that "[i]n none of the individual cases did the Sheriff forcibly break and enter into the premises of plaintiffs." App. at 91. (emphasis added).

Force may be effected by psychological as well as physical means. The writ defendant who submits to the seizure of his property by the country sheriff under the force of authority cannot be said to have voluntarily forfeited his property. See Bumper v. North Carolina, 391 U.S. 543,

548-50 (1968); and Johnson v. United States, 333 U.S. 10, 13 (1948). It would have been foolhardy as well as fruitless for Mrs. Parham, who did at first attempt to deny the sheriff's deputies entry, to have persisted in her refusal and subject herself to criminal liability. This conclusion is supported by the Blair decision, which declares that "[i]n such a situation acquiescence to the intrusion cannot operate as a voluntary waiver of Fourth Amendment rights." ___ Cal. 3d at ___, __ P.2d at ___, __ Cal. Rptr. at ___ (slip opinion at 23).

Moreover, under the reasoning of Wuchter v. Pizzutti, 276 U.S. 24 (1928); and Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915), discussed at pp. 41-42 surpa, the court erred in focusing upon the individual fact situations before it rather than considering the state statutory scheme on its face. Cf. Blair.

The fact that forcible entries and seizures can and do occur in executions upon replevin writs is established by the affidavit of Margaret Elzeena Johnson of Chester, Pennsylvania, which is attached hereto as Appendix "C". In her case, sheriff's deputies executing upon a writ of replevin broke into her home while she was at work by breaking her door glass and pulling the door casing and frame off the wall. Having effected permanent damage to the door and leaving Mrs. Johnson's home completely accessible to any and all passers-by, the deputies seized and removed the goods cited on the replevin writ.

The court below terms the seizures here reasonable because they were "purely civil in nature, seeking property covered by lawfully created security interests." App. at 105. It is clear, however, that the Washington seizure did not concern property covered by a security interest and that the security involved in the Epps seizure was invalid. See Williams v. Walker-Thomas Furniture, Inc., 350 F.2d 445 (D.C. Cir. 1965). Of most significance, however, is that the Pennsylvania replevin procedure provides no means to screen out unfounded or wrongful claims. There is no requirement

that the writ plaintiff prove, present ex parte, or even allege a claim of right.

At no point need the writ plaintiff, then, establish probable cause for his claim, which Camara terms a prerequisite. In criminal cases, a search warrant must be obtained from a magistrate before a lawful search and seizure may result. Here, the writ plaintiff need present his case before no court officer. See Note, 19 U. Kan. L. Rev. 281, 286-87 (1971). He merely presents his entry of appearance, affidavit of value, bond and praecipe to the writ of the sheriff, who in turn ministerially issues the writ. In the California procedure challenged in Blair, the writ plaintiff was at least required to file a complaint, obtain the issuance of a summons, and file an affidavit asserting a claim of right and wrongful detention. ___ Cal.3d at ___, __ P.2d at ___, __ Cal. Rptr. at ___ (slip opinion at 2). Nevertheless, the court there found that these procedures "do not satisfy the probable cause standard." ___ Cal.3d at ___, __ P.2d at ___, __ P.2d at ___, __ Cal. Rptr. at ___ (slip opinion at 20).

The plaintiffs contend, in their due process argument, that notice and an opportunity to be heard must precede a forcible seizure of their property. Here, however, they emphasize that the absence of any judicial inquiry into the merits of the plaintiff's claim prior to a forcible search of their home and seizure of their personal property renders the replevin procedure violative of the fourth amendment.

CONCLUSION

For all of the reasons stated herein, it is respectfully submitted that the judgment of the court below should be reversed.

/s/ David A. Scholl DAVID A. SCHOLL

/s/ Harold I. Goodman HAROLD I. GOODMAN

/s/ Jonathan M. Stein JONATHAN M. STEIN

/s/ Harvey N. Schmidt HARVEY N. SCHMIDT

August 7, 1971

APPENDIX "A"

STATUTES AND RULES INVOLVED

The Act of 1705, 1 Sm.L. 44, § 12, 12 P.S. § 1821, provides as follows:

§1821. Writs of replevin authorized

It shall and may be lawful for the justices of each county in this province to grant writs of replevin, in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law.

The Act of April 19, 1901, P.L. 88, as amended, 12 P.S. §§ 1824 to 1844, provides as follows:

§1824. Issue of writ; bond

Before any writ of replevin shall issue out of any court of this commonwealth, the person applying for said writ shall execute and file with the prothonotary of the said court a bond to the commonwealth of Pennsylvania, for the use of the parties interested, with security in double the value of the goods sought to be replevied, conditioned that if the plaintiff or plaintiffs fail to maintain their title to such goods or chattels, he or they shall pay to the party thereunto entitled the value of said goods and chattels, and all legal costs, fees and damages which the defendant or other persons, to whom such goods or chattels so replevied belong, may sustain by reason of the issuance of such writ of replevin.

§1825. Service of writ; certification of name of person in possession; intervention as defendant

If any other person than the defendant named in the writ be found in possession of the goods and chattels he shall be duly served with a writ, and his name added as a party defendant to the cause. The writ shall command the sheriff to serve the party in possession as well as the defendant named. The sheriff shall, on demand of such person, forthwith certify his name and address to said prothonotary as that of the party in possession; and then, if such person files an affidavit in said court that said goods and chattels belong to him, he may file a counter bond in proper time and manner, or otherwise act as a defendant before the return of said writ, without obtaining leave to intervene.

§1826. Intervention and counter bond

The court or, in vacation time, a judge thereof at chambers, may grant leave to any person, upon an affidavit filed that the goods and chattels so replevied belong to him, to intervene as party defendant in such suit; and the defendant or party so intervening may file a counter bond within seventy-two hours after such goods or chattels have been replevied, during which time said goods and chattels shall remain in the possession of the sheriff, and which time may be extended by the court or, in vacation time, a judge thereof at chambers, upon cause shown Such counter bond shall be given to the Commonwealth of Pennsylvania, for the use of the parties interested, in the same amount as the original bond and with like conditions.

§1827. Right of possession in case of several claimants

Where several parties claim the right to give a counter bond and have possession of said goods and chattels, the party who is in actual or constructive possession of the goods and chattels at the time the writ of replevin was served shall, upon entering the proper counter bond, be entitled to have said goods and chattels.

§1828. Claim property bond

Provided, that in any action of replevin hereafter to be brought, where the defendant or person intervening in such action, claiming title to the property replevied, shall enter a claim property bond therefor, if the plaintiff at the time he files his bond, and before the writ is issued, did aver that by reason of the nature of such property, or of any special circumstances connected with his alleged ownership thereof, the actual pecuniary value of such property will not compensate him for the loss thereof, the court or, in vacation time, any judge thereof at chambers, shall order such property to be impounded in the custody of the sheriff, or such other person as the court or, in vacation time, any judge thereof at chambers, may designate, to abide the final determination of the action.

§1829. Estimate of charges to be exhibited

Provided the plaintiff shall exhibit an estimate of the probable necessary charges and expenses of the storage, care or keep of such property pending the final determination of such action, and shall pay, or secure the payment of, such charges and expenses as the court or, in vacation time, any judge thereof at chambers, shall approve.

§1830. Security

The amount of such security shall be fixed by the court, or, in vacation time, by any judge thereof at chambers, and said security shall be approved in the same manner as now provided for the approval of the security entered by the plaintiff on the issuing of the writ of replevin. The bond shall be to the Commonwealth, and shall be for the use of any party interested in the payment of the storage, care or keep of the impounded property.

§1831. Delivery of property; costs

Upon the final determination of such action, the property so impounded shall be delivered to the party who shall have successfully maintained his title thereto, and the charges and expenses of the storage, care or keep of such property shall be assessed as costs of suit, and shall be recoverable from the

unsuccessful party in the same manner as damages and costs are now recoverable in action of replevin.

§1832. Declaration

The plaintiff in such action shall file a declaration, verified by oath, which shall consist of a concise statement of his demand, setting forth the facts upon which his title to the goods and chattels is based.

§1833. Rule to file declaration

The defendant or party intervening may enter a rule upon plaintiff to file such declaration within fifteen days, and the plaintiff failing so to do a judgment of non pros. shall be entered, which judgment shall operate to forfeit said bond.

§1834. Affidavit of defense; judgment by default

The defendant or party intervening shall, within fifteen days after the filing of such declaration, file an affidavit of defense thereto, setting up the facts denying plaintiff's title and showing his own title to said goods and chattels; and in event of his failure so to do, upon proof that a copy of said declaration was served upon him or his attorney, judgment may be entered for the plaintiff and operates to forfeit any counter bond given by him.

§1835. Judgment in case of insufficient affidavit of defense

The court may enter judgment, with like effect, for want of a sufficient affidavit of defense, or for such goods and chattels as may be admitted to be the property of the plaintiff in the affidavit of defense, or may enter judgment, with like effect, for such goods and chattels as to which the court may adjudge the affidavit of defense insufficient.

§1836. Recovery of goods

And in the event of judgment being rendered in favor of the plaintiff for a portion of such goods and chattels replevied, he may proceed to recover such goods and chattels by writ of retorno habendo, or the value thereof after assessment of damages on a writ of inquiry of damages issued, and the case shall be proceeded in for recovery of the balance.

§1837. Proceedings in case defendant does not appear

If the defendant has been duly summoned and does not appear at the return-day of the writ, the plaintiff, having filed his declaration, may file a common appearance for the defendant, and proceed in the cause as in other cases.

§1838. Judgment for default of appearance

Where the writ has been returned nihil habet as to the defendant, it shall be lawful for the plaintiff, at and after forty-five days after the execution of the writ, to take judgment against the defendant for default of appearance: Provided, that the plaintiff, fifteen days prior to the entry of said judgment, shall have filed his declaration.

§1839. Issues

The declaration and affidavit of defense as originally filed, or as amended by leave of court, shall constitute the issues under which, without other pleadings, the question of the title to, or right of possession of, the goods and chattels as between all the parties shall be determined by a jury.

§1840. Conditional verdict

If any party be found to have only a lien upon said goods and chattels, a conditional verdict may be entered, which the court shall enforce in accordance with equitable principles.

§1841. Proceedings when verdict is for party not in possession

If the title to said goods and chattels be found finally to be in a party who has not been given possession of the same, in said proceeding, the jury shall determine the value thereof to the successful party, and he may, at his option, issue a writ in the nature of a writ of retorno habendo, requiring the delivery thereof to him, with an added clause of fieri facias as to the damages awarded and costs; and upon failure so to recover them, or in the first instance, he may issue execution for the value thereof and the damages awarded and costs; or he may sue, in the first instance, upon the bond given, and recover thereon the value of the goods and chattels, damages and costs; in the same manner that recovery is had upon other official bonds.

§1842. Bail

The prothonotary shall, in the first instance, fix the amount of bail and approve or reject the security offered. His action in either regard shall be subject to revision by the court or, in vacation time, a judge thereof at chambers. In order to determine the amount of bail, the plaintiff shall make an affidavit of the value of the goods and chattels, which value shall be the cost to the defendant of replacing them, should the issue be decided in his favor. The court or, in vacation time, a judge thereof at chambers may, upon motion, increase the amount of bail required; may require new bail, if for any reason the old bail has become insufficient, and may enter a non pros. against the party in default, if he has the goods and chattels, and its orders be not complied with, or may permit the substitution of bail for that already given and enter an exoneratur on the bail bond.

§1843. Alias and pluries writs

Alias and pluries writs of replevin may be issued if the goods and chattels be not taken or all the defendants named be not served, and the cause may proceed against defendants in fact served, though the goods and chattels be not found.

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§1844. Limitation of action on bond

No action shall be brought upon any bond given in accordance with the provisions of this act unless commenced within a year and a day after the final determination of the suit in which the bond was given. At the expiration of such period, if no action has been brought thereon, the said bond shall be discharged.

The Pennsylvania Rules of Civil Procedure challenged herein provide as follows:

Rule 1406. Action of Replevin

The rules governing the action of replevin shall not be deemed to suspend or affect

- (1) Section 3 of the Act approved April 3, 1779, 1 Sm. L. 470, Chap. DCCCXXVI, 12 P.S. 1846.
- (2) Section 7 of the Act approved March 22, 1817, P.L. [1816-17] 122, Chap. XCVIII, 6 Sm. L. 432, Chap. 4870, 53 P.S. 7177.
- (3) Section 1 of the Act approved May 15, 1871, P.L. 268, No. 249, 12 P.S. 1847.
- (4) Section 1 of the Act approved April 20, 1876, P.L. 43, No. 30, 12 P.S. 2174.
- (5) Section 1 of the Act approved June 8, 1881, P.L. 86, No. 95, 6 P.S. 3.
- (6) Section 10 of the Act approved April 19, 1901, P.L. 88, No. 61, as last amended by the Act approved April 30, 1925, P.L. 387, No. 233, Sec. 1, 12 P.S. 1844.
- (7) Section 1 of the Act approved May 7, 1925, P.L. 557, No. 300, 6 P.S. 11.
- (8) Section 21 of the Act approved February 19, 1926, P.L. 16, No. 3, as last amended by the Act approved June 16, 1937, P.L. 1811, No. 371, 47 P.S. 141.
- (9) Section 7 of the Act approved June 10, 1931, P.L. 492, No. 156, 3 P.S. 635.

Rule 1071. Conformity to Assumpsit

Except as otherwise provided in this chapter, the procedure in the action of replevin from the commencement to the entry of judgment shall be in accordance with the rules relating to the action of assumpsit.

Rule 1072. Venue

- (a) The action without bond may be brought in a county in which an action of assumpsit may be brought.
- (b) The action with bond may be brought in a county in which an action of assumpsit may be brought or in the county in which the property to be replevied is found.

Rule 1073. Commencement of Action

- (a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with
- (1) the plaintiff's affidavit of the value of the property to be replevied, and
- (2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.
- (b) An action of replevin without bond shall be commenced by filing with the prothonotary
- (1) a praecipe for a writ of replevin without bond or
 - (2) a complaint.

If the action is commenced without bond, the sheriff shall not replevy the property but at any time before the entry of judgment the plaintiff, upon filing the affidavit and bond prescribed by subdivision (a) of this rule, may obtain a writ of replevin with bond, issued in the original action, and have the sheriff replevy the property.

Rule 1074. Service

- (a) The sheriff shall serve the writ of replevin without bond in the same manner as a writ of summons in assumpsit.
- (b) The sheriff shall serve the writ of replevin with bond upon the defendant and any person not named as a party who is found in possession of the property in the same manner as a writ of summons in assumpsit and shall take possession of the property.
- (c) When the sheriff takes possession of the propperty the plaintiff shall have the right of service upon a defendant in any other county by having the sheriff of the county in which the action was commenced deputize the sheriff of the other county where service may be had.
- (d) When a person in possession of the property who is not a party to the action is served with a writ of replevin with bond the sheriff shall so state in his return and said person shall thereupon become a defendant in the action.
 - (e) When a writ of replevin with bond is issued but the property cannot be found, the action shall continue against any defendant served as an action of replevin without bond.

Rule 1075. Reissuance of Writ of Replevin With Bond

When a writ of replevin with bond is reissued, no new affidavit or bond need be filed.

Rule 1076. Counterbond

A counterbond may be filed with the prothonotary by a defendant or intervenor claiming the right to the possession of the property, except a party claiming only a lien thereon, within seventy-two (72) hours after the property has been replevied, or within seventy-two (72) hours after service upon the defendant when the taking of possession of the property by the sheriff has been waived by the plaintiff as provided by Rule 1077(a), or within such extension of time as may be granted by the court upon cause shown.

(b) The counterbond shall be in the same amount as the original bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the party filing it fails to maintian his right to possession of the property he shall pay to the party entitled thereto the value of the property, and all legal costs, fees and damages sustained by reason of the delivery of the replevied property of the party filing the counterbond.

Rule 1077. Disposition of Replevied Property. Sheriff's Return

- (a) When a writ of replevin with bond is issued, the sheriff shall leave the property during the time allowed for the filing of a counterbond in the possession of the defendant or of any other person if the plaintiff so authorizes him in writing.
- (b) Property taken into possession by the sheriff shall be held by him until the expiration of the time for filing a counterbond. If the property is not ordered to be impounded and if no counterbond is filed, the sheriff shall deliver the property to the plaintiff.
- (c) If the property is not ordered to be impounded and the person in possession files a counterbond, the property shall be delivered to him, but if he does not file a counterbond, the property shall be delivered to the party first filing a counterbond.
- (d) When perishable property is replevied the court may make such order relating to its sale or disposition as shall be proper.

(e) The return of the sheriff to the writ of replevin with bond shall state the disposition made by him of the property and the name and address of any person found in possession of the property.

Rule 1078. Exemption of Property Preliminary Objection

The objection of immunity or exemption of property from replevin shall be raised by preliminary objection.

Rule 1079. Impounding Property

- (a) Prior to the delivery of the property by the sheriff to any party, a petition may be filed by any party requesting the court to order the property to be impounded in the custody of the sheriff or such other person as the court may direct.
- (b) The court shall order the property to be impounded if
- (1) the circumstances are such that the petitioner if found entitled to the property would not be adequately compensated for its loss by the payment of its pecuniary value, and
- (2) the petitioner furnishes security for the payment of storage charges and other expenses incidental to impounding of the property.
- (c) Upon the final determination of the action, the property shall be delivered to the successful party and the storage charges and other expenses incidental thereto shall be assessed as costs in the action. Adopted June 25, 1946. Eff. Jan. 1, 1947.

Rule 1080. Objections to Bond

The court, upon petition filed by any party, and after notice and hearing, may

- (1) review the action of the prothonotary in approving or rejecting the security offered;
- (2) increase or decrease the amount of any bond or require additional security for cause shown;

- (3) strike off a bond improperly filed; or
- (4) permit the substitution of a bond and enter an exoneration of a prior bond.

Rule 1081. Concealment of Property Examination of Defendant

The court, at any time during the pendency of the action, upon the petition of the plaintiff setting forth

- (1) that he is without knowledge of the location of the property and has not with reasonable diligence been able to ascertain its location; or
- (2) that the sheriff has been unable to locate the property; or
- (3) that the defendant has concealed, removed or transferred the property,

may order the defendant to appear and be examined orally under oath as to the whereabouts of the property. The court may enforce its order by attachment. If a writ of replevin with bond has been issued, the court may order the defendant to deliver the property to the sheriff if it is within the county or has been removed from the county for the purpose of preventing its recovery.

Rule 1082. Counterclaim. Lien. Conditional Verdict

- (a) A claim secured by a lien on the property may be set forth as a counterclaim. No other counterclaim may be asserted.
- (b) If any party is found to have a lien upon the property the court may enter a conditional verdict in order to enforce the rights of all parties.

Rule 1083. Judgment for Property When Defendant Is Not Served and Does Not Appear

If the property has been replevied by the sheriff, the court, upon motion of the plaintiff after complaint filed and after forty-five (45) days from replevy of the property, may enter judgment against any defendant who has not been served and who has not appeared in the action.

Rule 1084. Judgment Before Trial When Defendant Is Served or Appears

- (a) If judgment is entered before trial for the party in possession of the property, the judgment shall determine.
- (1) his right to retain possession of the property, and
 - (2) his right to recover special damages, if any.
- (b) If judgment is entered before trial for a party not in possession of the property, the judgment shall determine
 - (1) his right to recover possession of the property
- (2) the money value of the property based upon the value set forth in the plaintiff's complaint, and
 - (3) his right to recover special damages, if any.
- (c) Special damages shall be assessed by a trial at which the issues shall be limited to the amount of the damages.

Rule 1085. Judgment After Trial.

- (a) If judgment is entered after trial for the party in possession of the property, the judgment shall determine
- (1) his right to retain possession of the property, and
 - (2) the amount of any special damages sustained.
- (b) If judgment is entered after trial for a party not in possession of the property, the judgment shall determine
 - (1) his right to recover possession of the property
 - (2) the money value of the property, and
 - (3) the amount of any special damages sustained.

Rule 1086. Judgment. Enforcement

Judgment shall be enforced as provided in Rules 3170 to 3173, inclusive.

Rule 1087. Trial Without Jury.

The trial of actions in replevin by a judge sitting without a jury shall be in accordance with Assumpsit Rule 1038.

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RE: MITCHELL R. EPPS RC TP 0001825397

ACCOUNT STATUS CONTINUED

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APPENDIX C

MITCHELL EPPS, et al.,

Appellants

v. October Term, 1971

AMERICO V. CORTESE, et al., No. 70-5138

Appellees

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF DELAWARE :

AFFIDAVIT

SS

MARGARET ELZEENA JOHNSON, being duly sworn according to law deposes and says:

- 1. That she is Margaret Elzeena Johnson; that she resides at 1018 Concord Street, Chester, Pennsylvania; and that she is living with her child separate and apart from her husband.
- 2. That she and her husband at a time in the past entered into a credit transaction, which has since resulted in General Electric Credit Corporation, Public Ledger Building, Sixth and Walnut Street, Philadelphia, Pennsylvania, representing the creditor-vendor in such credit transaction.
- 3. That previous to April 29, 1972, her last contact with General Electric Credit Corporation had been on or about the first week in March, 1971 when she paid ten dollars (\$10.00) on her and her husband's account with the understanding that a reduced payment schedule would be forwarded to her.
- 4. That upon returning home from her work at Kenneth Janatorial Service, Folsom, Pennsylvania on April 19, 1971 she discovered that someone or group had made a forcible entry of her home and had taken a substantial portion of her furniture. The forcible entry caused the door used for entry to be substantially damaged, the glass in the door to

be broken and the door casing and frame to be pulled loose from the wall to which it is a part of and attached.

- 5. That upon further investigation she discovered that such forcible entry and taking of her furniture had been accomplished by the Sheriff of Delaware County or his agents pursuant to an Action of Replevin With Bond instituted by General Electric Credit Corporation, Court of Common Pleas Docket No. 3659, 1971.
- 6. That her first notice of General Electric Credit Corporation's instituting an Action of Replevin With Bond and that her first contact of any kind with General Electric Credit Corporation since the first week in March, 1971 was after she returned to her residence from work on April 19, 1971.

/s/ Margaret Johnson
Margaret Elzeena Johnson

Sworn to and subscribed before me this 6th day of May, 1971.

/s/ Thomas M. Graham
Thomas M. Graham
Notary Public, Media, Delaware County
My Commission Expires September 3, 1973



N THE

Supreme Court of the United

October Term, 1970

E MODERT SEAVER

No. 70-5138

PAUL PARHAM and ELLEN PARHAM et al.,
Appellants

v.

SEARS, ROEBUCK and CO. et al., Appellee

BRIEF FOR SEARS, ROEBUCK AND CO., APPELLEE

On Appeal from the United States District Court for the Eastern District of Pennsylvania

> ROBERT F. MAXWELL, Attorney for Sears, Roebuck and Co., Appellee

P. O. Box 6742 4640 Roosevelt Boulevard Philadelphia, Pa. 19132

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IN THE

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October Term, 1970

No. 70-5138

PAUL PARHAM and ELLEN PARHAM et al.,
Appellants

v.

SEARS, ROEBUCK and CO. et al., Appellee

QUESTION PRESENTED

Was not the lower Court correct in granting Appellee's Motion for Dismissal and Summary Judgment where the facts show that the Appellee was in possession of personal property to which it was rightfully entitled and the Appellants admitted that they had no rights in the said personal property either at the time of the replevin of such property by Appellee or at any time thereafter?

STATEMENT

The Appellant, Paul Parham, and the Appellee, Sears, Roebuck and Co., entered into a certain transaction on February 1, 1969, whereby possession of certain personal

property was delivered to the Appellant by the Appellee subject to a security interest and agreement complying with the Uniform Commercial Code of Pennsylvania and the Pennsylvania Goods and Services Installment Sales Act, 69 Purdon's Pennsylvania Statutes Annotated 636 (App. 67, 71, 72). By virtue of the said transaction and agreement, title to the said personal property remained at all times in the Appellee. Further, the Appellant granted to the Appellee the right to repossess the personal property upon Appellant's default in any of the terms of the transaction and agreement (App. 67, 72).

The Appellant did default in his obligations under the said agreement and transaction (App. 67, Para. 4; App. 73). The Appellee gave the Appellant numerous notices of the Appellant's default and also notified the Appellant of its desire and intent to retake possession of the goods in accordance with the terms of the agreement (App. 68,

Para. 5; App. 74, 75).

Appellee, acting through the Sheriff of Philadelphia County, did retake possession of the goods in accordance with its rights under the Uniform Commercial Code of Pennsylvania, 12A Purdon's Pennsylvania Statutes Annotated 9-503, the Pennsylvania Goods and Services Installment Sales Act and the Pennsylvania laws and rules of Civil Procedure relating to the action of replevin with bond. The retaking of possession was entirely peaceable, the wife of the Appellant admitting the Sheriff to the residence of the Appellant for this purpose (Paras. 6 and 7, App. 68).

Thereafter the present action was instituted by the Appellants, Paul and Ellen Parham, against the Appellee, Sears, Roebuck and Co. The present action requests the Court to order the Appellee to return to the Appellants the personal property involved and also asks the Court to enter a temporary and permanent injunction against the Appellee which would forbid any future actions of replevin

with bond.

It is, of course, to be noted that the Appellant, Ellen Parham, is improperly joined in this action since she was not a party to the transaction involving the personal property involved nor did she at any time nor at the present time have any rights therein.

The lower court granted summary judgment of dismissal in favor of all defendants. The plaintiffs, Parham and Washington, have appealed, but the plaintiffs, Epps,

have not.

SUMMARY OF ARGUMENT

The Appellant, Paul Parham, had no right of title or possession in the replevied goods at the time of the replevin or thereafter. To do otherwise than grant summary judgment to the Appellee would be a useless, expensive and unjust imposition upon the Appellee, which had title and the right to immediate possession in the replevied goods and has already suffered loss because of the Appellant's failure to comply with his payment schedule and his failure to return the goods to the Appellee.

To authorize a class action would likewise be useless and unjust since the class of plaintiffs would have to be persons who had and have no right to title or possession in the replevied goods. Such persons would obviously have

no right to any type of recovery.

The particular facts of this case are of the greatest importance to the Appellee. The Appellee had and has title and right to possession, it gave notice of its rights and intentions to the appellant, it requested him to comply with his payment schedule before replevying, and it replevied peaceably, gaining entrance to the premises of the Appellant by permission. To deny to the Appellee its clearly established rights on the hypothesis that someone might possibly in another case abuse the constitutional rights of some unidentified person would be unjust and would in fact

deprive the Appellee of its constitutional rights without the due process of law required by the Fifth and Fourteenth Amendments.

The right to immediate possession upon default is a right granted by the Uniform Commercial Code which has been enacted in 49 states. The right to replevin originated in Pennsylvania in 1705. Its purpose is to give immediate possession to those wrongfully deprived of their property. But for this remedy, many persons so wronged would have no right whatsoever except to obtain a worthless judgment. This would be particularly true in cases involving mobile property, stolen goods, and goods which may disappear unless promptly sequestered.

Both the Uniform Commercial Code and the Pennsylvania Statutes and Rules relating to replevin contain substantial protections for the party against whom the replevin is made and substantial sanctions against the

party replevying wrongfully.

Until and unless there is shown a clear and actual abuse of constitutional rights, neither the statutes nor the rules should be declared unconstitutional. Even when such an abuse be shown, the court's decision should be solely and carefully aimed at the particular abuse. To act generally may cause substantial injustice to parties whose rights and needs are not before the Court.

The lower Court's granting of Appellee's Motion for

Summary Judgment should therefore be affirmed.

ARGUMENT

The Summary Judgment granted by the lower court must be sustained since the appellants have shown no rights in the replevied property and demonstrated no violation of their constitutional rights.

There can be no question but that the Appellants, Parham, have admitted that whatever right they may have ever possessed in the personal property involved arose from a certain agreement executed between the Appellant, Paul Parham, and the Appellee, Sears, Roebuck and Co., on February 1, 1969. The Appellants have further admitted that there was a default by the Appellant, Paul Parham, in reference to the said agreement. The agreement, upon such default, gave the Appellee the right to immediate possession of the personal property in which the Appellee had retained title. After numerous notices of the default and its intentions to exercise its right to possession thereof, the Appellee exercised such right in accordance with the Uniform Commercial Code of Pennsylvania, 12A Purdons Pennsylvania Statutes Annotated 9-503, the Goods and Services Installment Sales Act of Pennsylvania and the statutes and rules concerning the action of replevin. The Appellants admit that the Appellee acted entirely in accordance with its rights under the said laws and the agreement executed in accordance therewith, and that there was a peaceable taking of the personal property with no force or violence of any sort (Para. 7, App. 68).

It is quite obvious, therefore, that at the present time and at the time the state replevin action and the instant action were instituted, the Appellants had no right whatsoever to the personal property involved. They had no right to possession nor did they have title thereto. For this Court to order the said personal property returned to the Appellants would, therefore, be not only a vain and temporary gesture but would be a clear violation of the legal rights of the Appellee as established by the Uniform Commercial Code of Pennsylvania, the agreement executed thereunder, the admissions of the Plaintiffs in their Complaint and the Stipulation of Facts agreed to by the Appellants, Parham, and the Appellee, Sears, Roebuck and Co. (App. 67).

Further litigation would be a useless, expensive and unjust imposition upon the Appellee, which, by the Appellant's own admissions in the Stipulation (App. 67), has done no wrong and has already suffered loss and a deprivation of its rights solely because of Appellant's breach of his contractual duties owing to Appellee and his failure to surrender to Appellee Appellee's own property until legal action was actually instituted. The granting of the prayer of Appellant's complaint would be to render a decision clearly ignoring the facts established in evidence. It would, therefore, be a judicial deprivation of property without due process of law in violation of Appellee's rights under both the Fifth and Fourteenth Amendments of the Constitution.

The Appellants in their various Briefs, Memoranda of Law and Pleadings consistently argue that the particular facts of the case before this Court are of no importance. They state that this Court should exercise its power to declare the statutes of the Commonwealth of Pennsylvania unconstitutional even though it has before it no evidence of an actual abuse of anyone's constitutional rights. They contend that the Court should ignore and penalize the actual Appellee before it because some other party in some other case at some other time may have or may in the future violate somebody's constitutional rights by a misuse of the statutory authority conferred by the Commonwealth. The common law requirement that there be an actual dispute before the Court and actual injured parties was established to prevent this type of manifest injustice. Hypotheses should not be substituted for facts nor actual litigants regarded as surplusage.

In the case of Parham v. Sears, Roebuck and Co., the lower court's dismissal would appear to be the only proper decision. If the Appellants are to prevail, the Court must find the constitutional violation in the companion cases or in the attempted class action. The Epps case was not appealed and is, therefore, not before this Court. The Findings of Fact of the lower court in the Washington case (App. 29) appear to establish clear equity and right on the side of the Appellee in that matter.

As to a class action, the Attorney General of Pennsylvania on Page 3 of his Brief clearly establishes that a

class action should not be permitted.

If a class action were permitted, the plaintiffs in such class action would have to consist of plaintiffs who do not own and have no right to possession of the goods replevied at the time of the replevin. The defendants in such an action would have to be parties who have full rights of title and possession, both now and at the time of the replevin, and whose rights were being violated by the plaintiffs. It is to be noted that the statutes of Pennsylvania and the Rules of Civil Procedure promulgated thereunder allow replevin solely to parties having rights of possession and title. Nowhere do the statutes or rules give any authority for a forceable breaking and entering of real estate and in none of the instant cases did such a breaking and entering occur (App. 90, 91, Para. 9, 10; App. 68, 69, Para. 7, 12). The class, as defined above, would seem to have no right on which to base a decision in its favor. Thus, even the allowance of a class action would be an empty gesture imposing further penalties on the Appellee.

Replevin is an ancient procedure in effect in Pennsylvania since 1705. Its purpose is to prevent irreparable harm to the owners of personal property where there is a danger of the said personal property disappearing or being severely damaged. It has been used over the years by numerous individuals, corporations, banks, finance com-

panies, automobile dealers and the United States Government itself to protect themselves against the depredation of persons refusing to comply with their just contractual obligations and having no right whatsoever in the goods replevied. The right existed at the time of the Constitutional Convention and was being excercised in the City of Philadelphia under the very statute now under attack at the very moment that that Convention sat in Independence Hall. The matters in which replevin may be used involve a wide spectrum of substantive rights. It is often essential to the recovery of stolen goods, to prevent the removal or concealment of mobile personal property by persons having no right thereto, and to prevent the denial of clear property rights to persons entitled thereto. To declare this remedy unconstitutional on the basis of hypothetical possibilities may well cause extremely substantial harm to persons who are being deprived of their rights illegally and to whom this swift and efficient remedy is the only practical solution. Without the most serious and widespread consideration of all of the many instances where replevin is of value, a court should not strike down the remedy and thus aid private individuals to deprive others of their rights under the Fifth and Fourteenth Amendments. It would seem that any change in replevin procedures so ingrained within the law throughout the years is solely a prerogative of the legislature and not of the courts.

Further, the replevin statutes of Pennsylvania contain strong protections for the debtor. The plaintiff in a replevin action must file a bond in double the value of the goods replevied, and the party replevying is liable for substantial damages in the event of a wrongful replevin. (App. 59, para. 7; App. 69, para. 13) The defendant in such an action can immediately petition the court to adjust the bond and may litigate the right to possession and title and any damages he may have sustained due to a wrongful seizure of his goods. No counterbond is necessary for the defendant to take the above steps. The replevin ac-

tion is never ended until judgment is entered by the court and all rights of the defendant to the above procedures remain unaffected until such judgment is entered. Thus, in the instant cases, the Appellants have substantial state rights which they could have pursued in the state courts if they in fact have any valid right to the goods replevied.

Such rights still remain open to them. [App. 69]

The Appellants put great emphasis on the case of Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969). The Court, speaking through Justice Douglas, emphasized in that case that it was outlawing the summary procedure complained of because of the fact that the wages garnisheed were clearly the property of the person against whom the garnishment was made and that such wages were property of a very specific type, much different from what is ordinarily regarded as personal property.

The Court further noted at 395 U.S. 339, 23 L. Ed. 2d 352 that garnishment of wages did not present a situation where "special protection to a state or creditor interest"

was involved.

It is to be noted that the Court of Appeals for the Tenth Circuit in the case of Brunswick Corp. v. J. P. Inc., 424 F. 2d 100, 105 (1970) held that the doctrine of the Sniadach case does not apply to the enforcement of a creditor's rights under a security interest authorized by the Uniform Commercial Code. The court also clearly held that once the debtor had admitted default under the security agreement the rights of the creditor to immediate possession were perforce admitted. Thus, there was nothing to litigate. The United States District Court for the Southern District of Florida held to the same effect in the case of Fuentes v. Faircloth which is being argued contemporaneously with the instant case.

The provisions of the Uniform Commercial Code, effective in forty-nine of the fifty states, authorize the citizens of those states to contract between themselves as to title, possessory interests, liens, and the remedies to en-

force such rights among themselves. Article 9 of that Code. as now existent, represents the work of many years by legal scholars and commercial experts. 12A Purdons Pennsylvania Statutes Annotated 9-503 provides for the right of the secured party to take possession of collateral upon default and to proceed by writ of replevin. Such title retention agreements with their remedial provisions are widespread and innumerable throughout the nation. To say, without serious studies of the widespread effects which may result, that part or all of the type of agreement authorized by the Uniform Commercial Code cannot be entered into because of constitutional prohibitions is to tread on extremely dangerous ground. This again would seem to be a policy decision that should be left to the legislature. To say that commercial practices so established throughout the nation and so ancient are now unconstitutional should only be done after the most thorough study and analysis-the type of analysis that is difficult if not impossible for a court but is peculiarly within the province of a legislative study committee.

Not only do the replevin statutes and rules grant substantial protection to the debtor, but the Uniform Commercial Code also does so. Even after the replevin has been consummated, the party replevying under a Security Agreement must comply with all the provisions as to disposition of the goods contained in 12A Purdons

Pennsylvania Statutes Annotated 9-504 et seq.

It is therefore respectfully submitted that this Court should not make a general declaration of unconstitutionality in matters of this nature until a specific violation of constitutional rights is before it. Then only should it act and even then its action should be carefully aimed at the particular violation or abuse. The mere fact that a statute or rule may be abused should not be sufficient ground to deny its efficacy to those who are using it properly in order to protect their essential rights. To act broadly where so many different individuals and divergent interests may be affected may in fact cause substantial injustice to inno-

cent parties of whom the Court has no knowledge and whose rights and needs are not before the Court.

CONCLUSION

Under the above circumstances, it is respectfully submitted that the Court below had no alternative but to grant the Appellee's motion for summary judgment in the case of Paul Parham and Ellen Parham v. Sears, Roebuck and Co., and that this Court should affirm that decision.

Respectfully submitted,

ROBERT F. MAXWELL

Attorney for Sears, Roebuck and Co., Appellee

September 3, 1971



In the Supreme Court of United States

FILED

October Term, 1970

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MITCHELL EPPS et al...

Appellants

V.

AMERICO V. CORTESE et al.,

Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA—APPELLEE

J. SHANE CREAMER
Attorney General
PETER W. BROWN
Deputy Attorney General
For the Commonwealth,
Appellee

State Capitol Harrisburg, Pennsylvania 17120



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STATEMENT

Suit was commenced in this matter by appellants, plaintiffs below, on September 18, 1970 in the U.S. District Court for the Eastern District of Pennsylvania. Notice of the filing of the action, of subsequent hearings, motions and stipulations were duly eved on the former Attorney General of the Commonwealth of Pennsylvania by appellants pursuant to 28 U.S.C. Section 2284. The former Attorney General elected to take no action in the court below and did not appear at any hearing or file any formal court papers.

Subsequently the prior administration terminated office on January 20, 1971 and the present administration took office. By this time all proceedings below had been completed and the litigation awaited only a determination by the court. In due course, copies of the opinion below, the notice of appeal of appellants, and appellants' Jurisdictional Statement were received. A review of the file at that time, led to a determination that it would be in the best interests of the citizens of the Commonwealth to participate in this matter on behalf of the appellants. On May 25, 1971, the present Attorney General notified this Court of its concurrence in appellants' request that probable jurisdiction be noted.

The Department of Justice of the Commonwealth of Pennsylvania is faced with another harsh and patently unconstitutional creditor's remedy in this case. The use of replevin with bond has enabled creditors to deprive citizens of this Commonwealth of the use and possession of their

property without notice and opportunity to be heard. As the officer of the Commonwealth charged with the responsibility of upholding the Constitution of the United States and the direction and supervision of the Pennsylvania Bureau of Consumer Protection, the Attorney General believes that the rights of all consumers must be closely guarded and protected from the kind of abuse caused by use of replevin with bond. Under the law presently in effect, any individual may, at any time, compel the sheriff to serve a writ of replevin upon any other individual and to take possession of the property of that individual merely by filing with the prothonotary of the Court of Common Pleas four simple pieces of paper. The individual taking action need only appear and file a notice of appearance: a praecipe for a writ, which simply requests that a writ issue: an affidavit as to his belief of the value of the property; and a bond in double that amount. Neither the sheriff nor the prothonotary are ever informed, and may not request information concerning the reason for the seizure. State Rules of Civil Procedure require that on direction of the plaintiff the sheriff "shall take possession of the property". Pennsylvania Rules of Civil Procedure. Rule 1074(b). Even after the taking, the defendant in the action is never informed of the reasons therefor unless he begins a court proceeding of his own to compel such disclosure.

The present Attorney General, therefore, respectfully submits that the statutes and rules of Pennsylvania authorizing writ of replevin with bond are unconstitutional on their face and that the court below erred in granting summary judgment on behalf of the defendants below.

ARGUMENT

THE COURT BELOW ERRED IN FOCUSING ON THE PARTICULAR FACTS BEFORE IT AND DISREGARDED THE BROAD SCOPE OF THE STATUTORY LANGUAGE

Action in the court below was brought by plaintiffs as a class action on behalf of all residents of Pennsylvania who might be affected by the unconstitutional use of the statutes and rules here in question. The Court below properly ruled that since plaintiffs were attacking the statutory language on its face it was unnecessary to rule on the question of propriety of the class action. If the Court were to find the statutes and rules unconstitutional on their face, they would as a matter of course fall as to all individuals.

After making this statement, however, the Court proceeded to analyze the statutes and rules as applied to the plaintiffs then before the Court. In fact, the Court limited its analysis to the factual situation facing two of the named plaintiffs. If the constitutionality of these statutes are to be considered on their face, the factual situations of any plaintiff or group of plaintiffs becomes irrelevant. Plaintiffs in their memoranda filed below made clear their position that the "facts relating to the merits of the named plaintiff's individual cases are irrelevant and merely serve to cloud the issue at bar." Plaintiffs' Supplementary Memorandum in Support of Their Motions for Preliminary

Injunction and Summary Judgment, at 1. The Court below refused to test the statutes solely on their merits and insisted that a ruling must be based not only on the face of the statutes and rules in question but in addition "in light of the present record." 326 F. Supp 127, 136. The Court refused to look at what it called "hypothetical circumstances of undue hardship not presently before the court." Ibid On the other hand, in the same page of its opinion, the Court in a footnote considers a "hypothetical circumstance" in which immediate action is necessary." Id. at 136, footnote 9.

The Court below, unfortunately indulged in a kind of reasoning which this Court has rejected on numerous occasions in the past. It has refused to consider the plea of a plaintiff who has boldly attacked the constitutionality of the statutes before it. In Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915), this Court was faced with an opinion of the Supreme Court of Florida which refused to look into the constitutionality of an Act on behalf of an individual when it felt that that individual was not prejudiced by the possible unconstitutionality. The Florida Supreme Court stated that:

"The statute presents many difficulties, that may arise as to others not similarly situated, and may as such be beyond the power of the legislature; but the party now before this court has not brought himself within the class who may justly complain, and the judgment as to him, upon the authority of our former holding, is, therefore, affirmed." Id. at 418.

The reasoning of the Florida Court was rejected, and this Court firmly stated:

"But, it is said, that plaintiff in error is not within that class... The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which it was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon merits. Rees v. Watertown, 19 Wall. 107, 123." Id. at 424.

In the later case of Wuchter v. Pizzutti, 276 U.S. 13 (1928), this Court was asked to consider the validity of a New Jersey non-resident motorist statute which authorized service of process upon a non-resident by serving a copy of the complaint on the Secretary of the State of New Jersey. The statute made no provision for actual notice to the defendant. In the case actually before the New Jersey Court, Wuchter, a Pennsylvania resident, was personally served in Pennsylvania with a copy of the complaint against him. Wuchter, although in receipt of actual notice of the hearing in New Jersey, failed to appear, and allowed a default judgment to be entered against him. He then appealed, claiming that lack of a provision in the statute for an actual notice rendered the statute unconstitutional. The New Jersey Court ruled against Wuchter. but this Court reversed. Since Wuchter's attack was one of law and not of fact, this Court looked only to the law as it was contained in the statute. The opinion states:

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it." (Citations omitted) *Id.* at 24.

This Court refused to uphold the statute stating that:

"A provision of law . . . that leaves open such a clear opportunity for the commission of fraud (Heinemann v. Pier, 110 Wis. 185) or injustice is not a reasonable provision, and in the case supposed would certainly be depriving the defendant of his property without due process of law."

In the very recent case of Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), this Court considered the rejection by the Supreme Court of Wisconsin of an attack on the constitutionality of Wisconsin statutes covering pre-judgment garnishment of wages. The Wisconsin Court opened its opinion with an attack on the type of action brought by Mrs. Sniadach:

"Appellant attacks the constitutionality of Wisconsin's garnishment before judgment statutes, ... on a number of grounds based on injustices and deprivations which have been, or are likely to be, suffered by others, but which she has not personally experienced."

Family Finance Corp. of Bay View v. Sniadach, 37 Wis. 2nd 163, 166; 154 N.W. 2d 259, 261 (1967).

The Court refused to consider her claim that in many cases there is, in fact no merit to the garnishment action on the grounds that "her affidavit in support of the order to show cause contains no allegation that she is not indebted thereon to plaintiff" or her allegation that provisions for the posting of a bond are unfair to the poor, on the grounds that "appellant has made no showing that she is a person of low income and unable to post a bond;" and her attack on the grounds that many wage earners lose their employment because of a garnishment, on the grounds that "appellant, however, has made no showing that her own employer reacted in this manner." 37 Wis. 2d at 167, 154 N.W. 2d at 261-262. This Court again, as it has in the past, objected to this narrow reasoning and found the statute unconstitutional on many of the grounds raised by Mrs. Sniadach and rejected below.

If the statutes now before the court are unconstitutional on their face, the factual situations presented by the named plaintiffs are immaterial and irrelevant. That the statutes and rules here in question provide for the taking of property before notice of hearing, is clearly evident. THE COURT BELOW ERRED IN NOT HOLDING THAT THE STATUTES AND RULES PROVIDING FOR REPLEVIN WITH BOND ARE UNCONSTITUTIONAL IN THAT THEY DEPRIVE INDIVIDUALS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

The operations of the statutes and rules in question have been stipulated to by the parties before the court below and are set forth in the court's opinion on pages 129 and 130. Briefly and simply stated, these statutes and rules provide for the taking of property by any individual, from any other individual, by court order, without prior notice, hearing, or any judicial determination. The Prothonotaries of the Courts of Common Pleas in Pennsylvania are required to issue writs at the request of any individual who files the proper papers. They are not entitled to, and may not request information concerning the justification for such taking. The Writ, once issued by the Prothonotary is required to be executed forthwith by the Sheriff and the Sheriff is required to take the property set forth in the Writ with or without the consent of the individual who has the possession of the property. notice of the taking is given before the actual seizure. No notice for the reason of the seizure is given at the time of the seizure or at any time thereafter unless defendant on the Writ files a Praecipe which demands that plaintiff on the writ file a complaint. Property not recovered within three days by the posting of a bond is subject to deprivation, at least until the termination of all court proceedings. It is almost impossible to conceive a more harsh and unreasonable deprivation of property.

The Court below's defense of this procedure is built around its conclusions contained in a paragraph of its opinion, 326 F. Supp. at 135. The Court finds that the service of the Writ provides the defendant with sufficient "actual notice of the pendency of another's claim to a possessory interest in a specific property involved." The property, it finds, "is not automatically and forever dispossessed", nor is it "forthwith delivered to the plaintiff on the writ." Plaintiff may, if he acts within 72 hours, retain possession upon the filing of a bond.

The Court below precedes this explanation with a lengthy discourse on the differences between the property involved in the instant case and the property involved in Sniadach and Goldberg v. Kelly, 397 U.S. 254 (1970). These distinctions, whether they are correct or not, become meaningless, if the property taken is secured other than by due process of law. All of an individual's property is protected by the constitution against a taking without constitutional safeguards, and the quantity and quality of that property are immaterial.

The statements of the Court below are clearly insufficient in light of prior decisions of this Court. The proposition that notice is sufficient if given at the time of the taking and if the taking is only temporary is soundly rejected by Mr. Justice Harlan in his concurring opinion in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 343 (1969):

"From my standpoint, I do not consider that the requirement of 'notice' and 'hearing' are satisfied by the fact that the petitioner was advised of the garnishment simultaneously with the garnishee, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact

that relief from the garnishment may have been available in the interim under less than clear circumstances."

Unlike the situation presently before the Court the statutes in the *Sniadach* case provided for notice of the reason for taking at the very time of taking, and provided, as a matter of course, for a hearing on the merits of the claim.

In the matter of Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915), the lower Court found no deprivation of due process rights, since defendant, Mr. Coe, was notified of the action against him at the time of levy and before any actual taking, and could prevent actual physical deprivation by instituting an action and raising meritorious defenses. This Court found sufficient lack of due process where a levy preceded notice and hearing and where defenses could be raised only through independent action of defendant below:

"The suggestion that because, ... a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder after the execution issues and before interference with his possession of his property right, therefore plaintiff in error, having been at liberty in this proceeding to raise meritorious questions, is not 'within the class who may justly complain,' will not withstand critical analysis." *Id.* at 423.

A hearing granted, as here, only after the taking, and only upon the specific request of the defendant on the writ cannot withstand the test of constitutionality. The statutes in question which provide for only such a hearing must fall.

THE COURT BELOW ERRED IN NOT HOLDING THAT THE STATUTES AND RULES WHICH PROVIDE FOR THE ISSUANCE OF WRIT OF REPLEVIN WITH BOND ARE UNCONSTITUTIONAL ON THE GROUNDS THAT THEY PERMIT UNREASONABLE SEARCHES AND SEIZURES IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Defendant Sheriff of the Court of Common Pleas of Philadelphia is required by law once having received a Writ of Replevin with Bond from the plaintiff on the Writ to "take possession of the property". Penna Rules of Civil Procedure, Rule 1074. All parties to this action agree, and the court notes in its opinion, 326 F. Supp at 129:

"the Sheriff, or his agents, when executing upon a Writ of replevin with bond, is required to enter the home of the defendant on the writ and to seize with or without consent of the defendant any and all of the property named in the writ."

The Court below finds the procedure below proper on three grounds; it suggests that the plaintiff may have waived their Fourth Amendment rights in signing a conditional sales agreement, that Fourth Amendment rights do not apply to civil process, and that looking at the plaintiffs before it, it finds that forcible entry did not, in fact, occur in the cases presented.

There can be no question, but that the Courts of Pennsylvania, have for many years permitted a sheriff to use force if necessary to seize property named in a writ of replevin. Seventy years ago the Court of Common Pleas of Philadelphia stated that:

"In a writ of replevin the command to take the goods of a plaintiff who has entered security for their return . . . and, under the common law and statute, the sheriff may break outer doors or enter by unusual ways for the purpose of executing under writ."

Jones v. Herron, 12 Pa. C. C. 183 (Philadelphia County C. C. 1891).

See also Commonwealth v. Temple, 38 D. & C. 2d 120 (Centre County Q.S. 1965); and Commonwealth v. Valvano, 33 D. & C. 128 (Lackawanna County Q.S. 1936).

The Court's suggestion that waiver may be implied from the conditional sales contract is clearly erroneous on two grounds. First the statute does not limit instances in which a taking may occur to those where defendants on the writ have signed conditional sales agreements. Secondly, even if it were so confined, the language of the contract must be stretched beyond its reasonable breaking point in an effort to read such language into its contents. Nowhere is such a waiver even hinted. The well known presumption of this Court that the waiver of a fundamental constitutional right will not be lightly inferred, Johnson v. Zerbst, 304 U.S. 458 (1938), must be rewritten to provide a strong presumption in favor of the presumption of waiver of the most fundamental constitutionally provided rights.

In addition, the Court questions the applicability of the Fourth Amendment protections to summary civil process to satisfy debt. Again, the Court below rejects clear statements of this Court to the effect that the Fourth Amendment protects all citizens, in all circumstances. In Weeks v. United States, 232 U.S. 383 (1914), it was clearly stated that:

"This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." Id. at 92.

In a more recent case of *Camera v. Municipal Court*, 387 U.S. 523 (1967), the ruling of the Court below was again rejected:

"It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Id. at 530.

Finally, the Court below again narrows its vision to the specific facts as it sees them presented by the individual plaintiffs. The Court finds that there was a lack of physical force in any of the cases presented, equates this lack of violence with consent, and holds the seizures to be reasonable. Clearly, the Court cannot properly equate consent with the surrender of a private individual of his property to the order of an official of the Court armed with the process of that Court. Even if the Court were correct, and consent had been given in individual cases presented, the statute on its face permits a taking without consent and, in fact, permits the use of physical force in an effort to secure that taking.

The statutes and rules in question do not limit the time during which a seizure may be made, or the manner

in which it may be accomplished, statutory language alone is controlling and the statute must fail for the lack of limiting language which will assure a taking only after consent, knowingly, intelligently and voluntarily given.

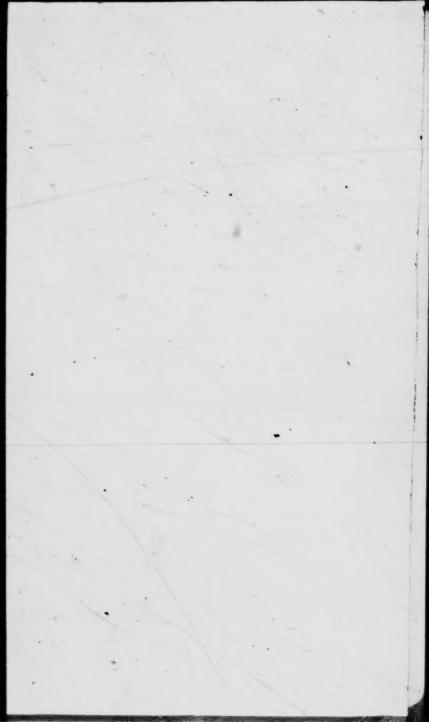
CONCLUSION

For all the reasons stated above, the Commonwealth of Pennsylvania joins with the Appellants, respectfully praying that the judgment of the Court below be reversed, and that this Court enter a judgment declaring the Pennsylvania Statutes and Rules which set forth the procedures establishing Replevin with Bond unconstitutional on their face.

J. SHANE CREAMER
Attorney General
PETER W. BROWN
Deputy Attorney General
Attorneys for the Commonwealth
of Pennsylvania, Appellee

August 7, 1971





NOTE: Where it is deemed desirable, a syllabus (headnots) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FUENTES ET AL. v. SHEVIN, ATTORNEY GEN-ERAL OF FLORIDA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 70-5039. Argued November 9, 1971-Decided June 12, 1972.

Appellants, most of whom were purchasers of household goods under conditional sales contracts, challenge the constitutionality of prejudgment replevin provisions of Florida law (in No. 70-5039) and Pennsylvania law (in No. 70-5138). These provisions permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of ex parte application to a court clerk, upon the pesting of a bond for double the value of the property to be seized. The sheriff is then required to execute the writ by seizing the property. Under the Florida statute the officer seizing the properly must keep it for three days. During that period the defendant may reclaim possession by posting his own security bond for double the property's value, in default of which the property is transferred to the applicant for the writ, pending a final judgment in the underlying repossession action. In Pennsylvania the applicant need not initiate a repossession action or allege (as Florida requires) legal entitlement to the property, it being sufficient that he file an "affidavit of the value of the property"; and to secure a post-seizure hearing the party losing the property through replevin must himself initiate a suit to recover the property. He may also post his own counterbond within three days of the seizure to regain possession. Included in the printed-form sales contracts that appellants signed were provisions for the sellers' repossession of the merchandise on the buyers' default. Three-

^{*}Together with No. 70-5138, Parham et al. v. Cortese et al., on appeal from the United States District Court for the Eastern District of Pennsylvania.

Syllabus

judge District Courts in both cases upheld the constitutionality of the challenged replevin provisions. Held:

- 1. The Florida and Pennsylvania replevin provisions are invalid under the Fourteenth Amendment since they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor. Pp. 12-24.
- (a) Procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another, and the minimal deterrent effect of the bond requirement against unfounded applications for a writ constitutes no substitute for a pre-seizure hearing. Pp. 12-15.
- (b) From the standpoint of the application of the Due Process Clause it is immaterial that the deprivation may be temporary and nonfinal during the three-day post-seizure period. Pp. 16-17.
- (c) The possessory interest of appellants, who had made substantial installment payments, was sufficient for them to invoke procedural due process safeguards notwithstanding their lack of full title to the replevied goods. Pp. 18-19.
- (d) The District Courts erred in rejecting appellants' constitutional claim on the ground that the household goods seized were not items of "necessity" and therefore did not require due process protection, as the Fourteenth Amendment imposes no such limitation. Pp. 19-21.
- (e) The broadly drawn provisions here involved serve no such important a state interest as might justify summary seizure. Pp. 22-23.
- 2. The contract provisions for repossession by the seller on the buyer's default did not amount to a waiver of the appellants' procedural due process rights, those provisions neither dispensing with a prior hearing nor indicating the procedure by which repossession was to be achieved. D. H. Overmyer Co. v. Frick Co., 405 U. S. —, distinguished. Pp. 24-27.

No. 70-5039, 317 F. Supp. 954, and No. 70-5138, 326 F. Supp. 127, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which Douglas, Brennan, and Marshall, JJ., joined. White, J., filed a dissenting opinion, in which Burger, C. J., and Blackmun, J., joined. Powell and Rehnoust, JJ., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 70-5039 AND 70-5138

Margarita Fuentes et al., Appellants, 70-5039 v. Robert L. Shevin, Attorney General of Florida, et al.

On Appeal from the United States District Court for the Southern District of Florida.

Paul Parham et al.,
Appellants,
70–5138 v.
Americo V. Cortese et al.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June 12, 1972]

Mr. JUSTICE STEWART delivered the opinion of the Court.

We here review the decisions of two three-judge federal district courts that upheld the constitutionality of Florida and Pennsylvania laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin. Both statutes provide for the issuance of writs ordering state agents to seize a person's possessions, simply upon the ex parte application of any other person who claims a right to them and posts a security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing. The question is whether these statutory procedures violate the Fourteenth Amendment's guarantee that no State shall deprive any person of property without due process of law.

I

The appellant in No. 5039, Margarita Fuentes, is a resident of Florida. She purchased a gas stove and service policy from the Firestone Tire and Rubber Company (Firestone) under a conditional sales contract calling for monthly payments over a period of time. A few months later, she purchased a stereophonic phonograph from the same company under the same sort of contract. The total cost of the stove and stereo was about \$500, plus an additional financing charge of over \$100. Under the contracts, Firestone retained title to the merchandise, but Mrs. Fuentes was entitled to possession unless and until she should default on her installment payments.

For more than a year, Mrs. Fuentes made her installment payments. But then, with only about \$200 remaining to be paid, a dispute developed between her and Firestone over the servicing of the stove. Firestone instituted an action in a small claims court for repossession of both the stove and the stereo, claiming that Mrs. Fuentes had refused to make her remaining payments. Simultaneously with the filing of that action and before Mrs. Fuentes had even received a summons to answer its complaint, Firestone obtained a writ of replevin ordering a sheriff to seize the disputed goods at once.

In conformance with Florida procedure, Firestone had only to fill in the blanks on the appropriate form documents and submit them to the clerk of the small claims court. The clerk signed and stamped the documents and issued a writ of replevin. Later the same day, a local deputy sheriff and an agent of Firestone

¹ See p. 5-7 of the text, infra.

went to Mrs. Fuent's' home and seized the stove and stereo.

Shortly thereafter, Mrs. Fuentes instituted the present action in a federal district court, challenging the constitutionality of the Florida prejudgment replevin procedures under the Due Process Clause of the Fourteenth Amendment.2 She sought declaratory and injunctive relief against continued enforcement of the procedural provisions of the state statutes that authorize prejudgment replevin.*

The appellants in No. 5138 filed a very similar action in a federal district court in Pennsylvania, challenging the constitutionality of that State's prejudgment replevin process. Like Mrs. Fuentes, they had had possessions seized under writs of replevin. Three of the appellants had purchased personal property—a bed, a table, and other household goods-under installment sales contracts like the one signed by Mrs. Fuentes; and the sellers of the property had obtained and executed summary writs of replevin, claiming that the appellants had fallen behind in their installment payments. The experience of the fourth appellant, Rosa Washington, had been more bizarre. She had been divorced from a local deputy sheriff and was engaged in a dispute with him over the custody of their son. Her former hus-

² Both Mrs. Fuentes and the appellants in No. 5138 also challenged the prejudgment replevin procedures under the Fourth Amendment, made applicable to the States by the Fourteenth. We do not, however, reach that issue. See n. 32, infra.

Neither Mrs. Fuentes nor the appellants in No. 5138 sought an injunction against any pending or future court proceedings as such. Compare Younger v. Harris, 401 U. S. 37. Rather, they challenged only the summary extra-judicial process of prejudgment seisure of property to which they had already been subjected. They invoked the jurisdiction of the federal district courts under 42 U.S.C. § 1983 and 28 U. S. C. § 1343 (3).

band, being familiar with the routine forms used in the replevin process, had obtained a writ that ordered the seizure of the boy's clothes, furniture, and toys.

In both No. 5039 and No. 5138, three-judge district courts were convened to consider the appellants' challenges to the constitutional validity of the Florida and Pennsylvania statutes. The courts in both cases upheld the constitutionality of the statutes. Fuentes v. Faircloth, 317 F. Supp. 954 (SD Fla); Epps v. Cortese, 326 F. Supp. 127 (ED Pa.). We noted probable jurisdiction of both appeals. 401 U. S. 906; 402 U. S. 994.

⁴ Unlike Mrs. Fuentes in No. 5039, none of the appellants in No. 5138 was ever sued in any court by the party who initiated seizure of the property. See pp. 9-10 of the text, infra.

⁵ Since the announcement of this Court's decision in Sniadach v. Family Finance Corp., 395 U.S. 337, summary prejudgment remedies have come under constitutional challenge throughout the country. The summary deprivation of property under statutes very similar to the Florida and Pennsylvania statutes at issue here has been held unconstitutional by at least two courts. Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (NDNY); Blair v. Pitchess, 486 P. 2d 1242 (Cal. Sup. Ct.). But see Brunswick Corp. v. J. & P., Inc., 424 F. 2d 100 (CA10); Wheeler v. Adams Co., 322 F. Supp. 645 (Md.): Almor Furniture & Appliances, Inc. v. MacMillan, 280 A. 2d 862 (NJ Sup. Ct.). Applying Sniadach to other closely related forms of summary prejudgment remedies, some courts have construed that decision as setting forth general principles of procedural due process and have struck down such remedies. E. g., Adams v. Egley, 40 U. S. L. W. 2546 (SD Cal., Feb. 11, 1972); Collins v. The Viceroy Hotel Corp., 40 U. S. L. W. 2537 (ND Ill., Feb. 2, 1972); Santiago v. McElroy, 319 F. Supp. 284 (ED Pa.); Klim v. Jones, 315 F. Supp. 109 (ND Cal.); Randone v. Appellate Dept., 488 P. 2d 13 (Cal. Sup. Ct.); Larson v. Fetherston, 44 Wis. 2d 712; Jones Press Inc. v. Motor Travel Services Inc., 286 Minn, 205. See Lebowitz v. Forbes Leasing & Finance Corp., 326 F. Supp. 1335, 1341-1348 (ED Pa.). Other courts, however, have construed Sniadach as closely confined to its own facts and have upheld such summary prejudgment remedies. E. g., Reeves v. Motor Contract Co., 324 F. Supp. 1011 (ND Ga.); Black Watch

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Under the Florida statute challenged here, "[a]ny person whose goods or chattels are wrongfully detained by any other person . . . may have a writ of replevin

Farms v. Dick, 323 F. Supp. 100 (Conn.); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (Hawaii); Young v. Ridley, 309 F. Supp. 1308 (DC); Termplan, Inc. v. Superior Court, 105 Aris. 270; 300 West 154th Street Realty Co. v. Department of Buildings, 26 N. Y. 2d 538.

⁶ The relevant Florida statutory provisions are the following:

"Florida Statutes, § 78.01

"RIGHT TO REPLEVIN.—Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond. . . .

"Florida Statutes, § 78.07

"BOND; REQUISITES.—Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action.

"Florida Statutes, § 78.08

"WRIT; FORM; RETURN.—The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.

"Florida Statutes, § 78.10

"WRIT, EXECUTION ON PROPERTY IN BUILDINGS, ETC.—In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof

to recover them" Fla. Stats. § 78.01. There is no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, "wrongfully detained." Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is "lawfully entitled to the possession" of the property, and that he file a security bond

". . . in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action." Fla. Stats. § 78.07.

On the sole basis of the complaint and bond, a writ is issued "command[ing] the officer to whom it may be directed to replevy the goods and chattels in the possession of the defendant . . . and to summon the defendant to answer the complaint." Fla. Stats. § 78.08.

and if it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.

[&]quot;Florida Statutes, § 78.13

[&]quot;WRIT; DISPOSITION OF PROPERTY LEVIED ON.—The officer executing the writ shall deliver the property to plaintiff after the lapse of three days from the time the property was taken unless within the three days defendant gives bond with surety to be approved by the officer in double the value of the property as appraised by the officer, conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant."

If the goods are "in any awelling house or building or enclosure," the officer is required to demand their delivery; but, if they are not delivered, "he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ . . . " Fla. Stats. § 78.10.

Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. After the property has been seized, he will eventually have an opportunity for a hearing, as the defendant in the trial of the court action for repossession, which the plaintiff is required to pursue. And he is also not wholly without recourse in the meantime. For under the Florida statute, the officer who seizes the property must keep it for three days, and during that period the defendant may reclaim possession of the property by posting his own security bond in double its value. But if he does not post such a bond, the property is transferred to the party who sought the writ, pending a final judgment in the underlying action for repossession. Fla. Stats. § 78.13.

The Pennsylvania law differs, though not in its essential nature, from that of Florida. As in Florida,

⁷The basic Pennsylvania statutory provision regarding the issuance of writs or replevin is the following:

[&]quot;12 P. S. § 1821. Writs of replevin authorized

[&]quot;It shall and may be lawful for the justices of each county in this province to grant writs of replevin, in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law."

The procedural prerequisites to issuance of a prejudgment writ are,

a private party may obtain a prejudgment writ of replevin through a summary process of ex parte application, although a prothonotary rather than a court clerk

however, set forth in the Pennsylvania Rules of Civil Procedure. The relevant rules are the following:

"Rule 1073. Commencement of Action

"(a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with

"(1) the plaintiff's affidavit of the value of the property to be

replevied, and

- "(2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.
- "(b) An action of replevin without bond shall be commenced by filing with the prothonotary

"(1) a praccipe for a writ of replevin without bond or

"(2) a complaint.

"If the action is commenced without bond, the sheriff shall not replevy the property but at any time before the entry of judgment the plaintiff, upon filing the affidavit and bond prescribed by subdivision (a) of this rule, may obtain a writ of replevin with bond, issued in the original action, and have the sheriff replevy the property. "Rule 1076. Counterbond

"A counterbond may be filed with the prothonotary by a defendant or intervenor claiming the right to the possession of the property, except a party claiming only a lien thereon, within seventy-two (72) hours after the property has been replevied, or within seventy-two (72) hours after service upon the defendant when the taking of possession of the property by the sheriff has been waived by the plaintiff as provided by Rule 1077 (a), or within such extension of time as may be granted by the court upon cause shown.

"(b) The counterbond shall be in the same amount as the original bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the party filing it fails to maintain his right to possession of the property he shall pay to the party entitled thereto the value of the property, and all legal costs, fees and damages sustained by reason issues the writ. As in Florida, the party seeking the writ may simply post with his application a bond in double the value of the property to be seized. Pa. Rule Civ. Proc. 1073 (a). There is no opportunity for a prior hearing and no prior notice to the other party. On this basis, a sheriff is required to execute the writ by seizing the specified property. Unlike the Florida statute, however, the Pennsylvania law does not require that there ever be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property. The party seeking the writ is not obliged to initiate a court action for repossession. Indeed, he need not even formally allege that he is lawfully

of the delivery of the replevied property of the party filing the counterbond.

[&]quot;Rule 1077. Disposition of Replevied Property. Sheriff's Return

[&]quot;(a) When a writ of replevin with bond is issued, the sheriff shall leave the property during the time allowed for the filing of a counterbond in the possession of the defendant or of any other person if the plaintiff so authorizes him in writing.

[&]quot;(b) Property taken into possession by the sheriff shall be held by him until the expiration of the time for filing a counterbond. If the property is not ordered to be impounded and if no counterbond is filed, the sheriff shall deliver the property to the plaintiff.

[&]quot;(c) If the property is not ordered to be impounded and the person in possession files a counterbond, the property shall be delivered to him, but if he does not file a counterbond, the property shall be delivered to the party first filing a counterbond.

[&]quot;(d) When perishable property is replevied the court may make such order relating to its sale or disposition as shall be proper.

[&]quot;(e) The return of the sheriff to the writ of replevin with bond shall state the disposition made by him of the property and the name and address of any person found in possession of the property."

a Pa. Rule Civ. Proc. 1073 (b) does establish a procedure whereby an applicant may obtain a writ by filing a complaint, initiating a later court action. See n. 7, supra. In the case of every appellant in No. 70-5138, the applicant proceeded under Rule 1073 (a) rather than 1073 (b), seizing property under no more than a security bond and initiating no court action.

entitled to the property. The most that is required is that he file an "affidavit of the value of the property to be replevied." Pa. Rule Civ. Proc. 1073 (a). If the party who loses property through replevin seizure is to get even a post-seizure hearing, he must initiate a law-suit himself. He may also, as under Florida law, post his own counterbond within three days after the seizure to regain possession. Pa. Rule Civ. Proc. 1076.

III

Although these prejudgment replevin statutes are descended from the common law replevin action of six centuries ago, they bear very little resemblance to it. Replevin at common law was an action for the return of specific goods wrongfully taken or "distrained." Typically, it was used after a landlord (the "distrainer") had seized possessions from a tenant (the "distrainee") to satisfy a debt allegedly owed. If the tenant then instituted a replevin action and posted security, the landlord could be ordered to return the property at once, pending a final judgment in the underlying action. However, this prejudgment replevin of goods at com-

⁹ Pa. Rule Civ. Proc. 1037 (a) establishes the procedure for initiating such a suit:

[&]quot;If an action is not commenced by a complaint, [under Rule 1073 (b)] the prothonotary, upon praccipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praccipe of the defendant, shall enter a judgment of non pros."

None of the appellants in No. 70-5138 attempted to initiate the process to require the filing of a post-seizure complaint under Rule 1037 (a).

¹⁰ See Plucknett, A Concise History of the Common Law 367–369 (1956); 3 Holdsworth, History of English Law 284–285 (1927); 2 Pollock & Maitland, History of English Law 577 (1909); Cobbey, Replevin 19–29 (1890).

mon law did not follow from an entirely ex parte process of pleading by the distrainee. For "[t]he distrainor could always stop the action of replevin by claiming to be the owner of the goods; and as this claim was often made merely to delay the proceedings, the writ de proprietate probanda was devised early in the fourteenth century which enabled the sheriff to determine summarily the question of ownership. If the question of ownership was determined against the distrainor the goods were delivered back to the distrainee [pending final judgment]." 3. Holdsworth, History of English Law 284 (1927).

Prejudgment replevin statutes like those of Florida and Pennsylvania are derived from this ancient possessory action in that they authorize the seizure of property before a final judgment. But the similarity ends there. As in the present cases, such statutes are most commonly used by creditors to seize goods allegedly wrongfully detained-not wrongfully taken-by debtors. At common law, if a creditor wished to invoke state power to recover goods wrongfully detained, he had to proceed through the action of debt or detinue.11 These actions, however, did not provide for a return of property before final judgment.12 And, more importantly, on the occasions when the common law did allow prejudgment seizure by state power, it provided some kind of notice and opportunity to be heard to the party then in possession of the property, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them,

¹¹ See Plucknett, supra, n. 10, at 362-365; Pollack & Maitland, supra, n. 10, at 173-175, 203-211.

¹² The creditor could, of course, proceed without the use of state power, through self-help, by "distraining" the property before a judgment. See n. 10, *supra*.

IV

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified." Baldwin v. Hale, 68 U. S. 223. See Windsor v. McVeigh, 93 U. S. 274; Hovey v. Elliott, 167 U. S. 409; Grannis v. Ordean, 234 U. S. 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U. S. 545, 552.

The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings "at a meaningful time." The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor Pennsylvania statute provides for notice or an opportunity to be heard before the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of

and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See Lynch v. Household Finance Corp., — U. S. —, —.

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decisionmaking that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 170-172 (Frankfurter, J., concurring).

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Stanley v. Illinois, — U. S. —, —.

This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," Boddie v. Connecticut, 401 U. S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. E. g., Bell v. Burson, 402 U. S. 535, 542; Wisconsin v. Constantineau, 400 U. S. 433, 437; Goldberg v. Kelly, 397 U. S. 254; Armstrong v. Manzo, supra, at 551; Mullane v. Central Hanover Tr. Co., supra, at 313; Opp Cotton Mills v. Administrator, 312 U. S. 126, 152-153; United States v. Illinois Cent. R. Co., 291 U. S. 457. 463; Londoner v. City & County of Denver, 210 U. S. 373, 385-386. See In re Ruffalo, 390 U. S. 544, 550-551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, supra, at 378-379 (emphasis in original).

The Florida and Pennsylvania prejudgment replevin statutes fly in the face of this principle. To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those require-

ments are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights.13 Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, selfinterested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

V

The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within

¹³ They may not even test that much. For if an applicant for the writ knows that he is dealing with an uneducated, uninformed consumer with little access to legal help and little familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property—however unwarranted—may go unchallenged, and the applicant may feel that he can act with impunity.

the Fourteenth Amendment's protection. In the present cases, the Florida and Pennsylvania statutes were applied to replevy chattels in the appellants' possession. The replevin was not cast as a final judgment; most, if not all, of the appellants lacked full title to the chattels; and their claim even to continued possession was a matter in dispute. Moreover, the chattels at stake were nothing more than an assortment of household goods. Nonetheless, it is clear that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment.

A

A deprivation of a person's possessions under a prejudgment writ of replevin, at least in theory, may be only temporary. The Florida and Pennsylvania statutes do not require a person to wait until a post-seizure hearing and final judgment to recover what has been replevied. Within three days after the seizure, the statutes allow him to recover the goods if he, in return, surrenders other property—a payment necessary to secure a bond in double the value of the goods seized from him. But it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment. Sniadach v. Family Finance Corp., supra; Bell v. Burson, supra. Both Snia-

¹⁴ The appellants argue that this opportunity for quick recovery exists only in theory. They allege that very few people in their position are able to obtain a recovery bond, even if they know of the possibility. Appellant Fuentes says that in her case she was never told that she could recover the stove and stereo and that the deputy sheriff seizing them gave them at once to the Firestone agent, rather than holding them for three days. She further asserts that of 442 cases of prejudgment replevin in small claims courts in Dade County, Florida, in 1969, there was not one case in which the defendant took advantage of the recovery provision.

dach and Bell involved takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them.¹⁵ Yet the Court firmly held that these were deprivations of property that must be preceded by a fair hearing.

The present cases are no different. When officials of Florida or Pennsylvania seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge and the time needed to take advantage of the recovery provision. The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

¹⁵ Bell v. Burson, supra, at 536. Although not mentioned in the Sniadach opinion, there clearly was a quick recovery provision in the Wisconsin prejudgment garnishment statute at issue. Wis. Stat. Ann. § 267.21 (1) (Supp. 1970-1971). Family Finance Corp. v. Sniadach, 37 Wis. 2d 163, 173-174. Mr. Justice Harlan adverted to the recovery provision in his concurring opinion. 395 U. S., at 343.

These sorts of provisions for recovery of property by posting security are, of course, entirely different from the security requirement upheld in *Lindsey* v. *Normet*, — U. S. —, —. There, the Court upheld a requirement that a tenant wanting a continuance of an eviction hearing must post security for accruing rent during the continuance. The tenant did not have to post security in order to remain in possession before a hearing; rather, he had to post security only in order to obtain a *continuance* of the hearing. Moreover, the security requirement in *Lindsey* was not a recovery provision. For the tenant was not deprived of his possessory interest even for one day without opportunity for a hearing.

B

The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest," Boddie v. Connecticut, supra, at 379, including statutory entitlements. See Bell v. Burson, supra, at 539; Goldberg v. Kelly, supra, at 262.

The appellants were deprived of such an interest in the replevied goods—the interest in continued possession and use of the goods. See Sniadach v. Family Finance Corp., supra, at 342 (Harlan, J., concurring). They had acquired this interest under the conditional sales contracts that entitled them to possession and use of the chattels before transfer of title. In exchange for immediate possession, the appellants had agreed to pay a major financing charge beyond the basic price of the merchandise. Moreover, by the time the goods were summarily repossessed, they had made substantial installment payments. Clearly, their possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause.

Their ultimate right to continued possession was, of course, in dispute. If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be

¹⁶ The possessory interest of Rosa Washington, an appellant in No. 5138, in her son's clothes, furniture, and toys was no less sufficient to invoke due process safeguards. Her interest was not protected by contract. Rather, it was protected by ordinary property law, there being a dispute between her and her estranged husband over which of them had a legal right not only to custody of the child but also to possession of the chattels.

entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments. and that they had no other valid defenses,17 that is immaterial here. The right to be heard does not denend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law it is no answer to sav that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer Works, 237 U. S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.18

C

Neverthless, the district courts rejected the appellants' constitutional claim on the ground that the goods seized from them—a stove, a stereo, a table, a bed, and so forth—were not deserving of due process protection, since they were not absolute necessities of life. The courts based this holding on a very narrow reading of Sniadach v. Family Finance Corp., supra, and Goldberg v. Kelly, supra, in which this Court held that

¹⁷ Mrs. Fuentes argues that Florida law allows her to defend on the ground that Firestone breached its obligations under the sales contract by failing to repair serious defects in the stove it sold her. We need not consider this issue here. It is enough that the right to continued possession of the goods was open to *some* dispute at a hearing since the sellers of the goods had to show, at the least, that the appellants had defaulted in their payments.

¹⁸ The issues decisive of the ultimate right to continued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality or scheduling of a prior hearing. See Lindsey v. Normet, — U. S. —, —. But it certainly cannot undercut the right to a prior hearing of some kind.

the Constitution requires a hearing before prejudgment wage garnishment and before the termination of certain welfare benefits. They reasoned that *Sniadach* and *Goldberg*, as a matter of constitutional principle, established no more than that a prior hearing is required with respect to the deprivation of such basically "necessary" items as wages and welfare benefits.

This reading of Sniadach and Goldberg reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.19 E. g., Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153; United States v. Illinois Cent. R. Co., 291 U. S. 457, 463; Southern Ry. Co. v. Virginia, 290 U. S. 190; Londoner v. City & County of Denver, 210 U. S. 373; Central of Georgia v. Wright, 307 U. S. 127; Security Trust Co. v. Lexington, 203 U. S. 323; Hibben v. Smith, 191 U. S. 310; Glidden v. Harrington, 189 U. S. 255. In none of those cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While Sniadach and Goldberg emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.20

¹⁹ The Supreme Court of California recently put the matter accurately: "Sniadach does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of past procedural due process decisions of the United States Supreme Court." Randone v. Appellate Department, 488 P. 2d 13, 22.

²⁰ Sniadach v. Family Finance Corp., supra, at 340; Goldberg v. Kelly, supra, at 264. Of course, the primary issue in Goldberg was

Nor did they carve out a rule of "necessity" for the sort of nonfinal deprivations of property that they involved. That was made clear in *Bell v. Burson, supra,* holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of "necessity" exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an "important interest," 402 U. S., at 539, entitled to the protection of procedural due process of law.

The household goods, for which the appellants contracted and paid substantial sums, are deserving of similar protection. While a driver's license, for example, "may become [indirectly] essential in the pursuit of a livelihood," ibid., a stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives. It is, after all, such consumer goods that people work and earn a livelihood in order to acquire.

No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally. And, under our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and

the form of hearing demanded by due process before termination of welfare benefits; the importance of welfare was directly relevant to that question.

protect only the ones that, by its own lights, are "necessary." 21

VI

There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, supra, at 379. These situations, however, must be truly unusual.²² Only in a few limited situations has this Court allowed outright seizure ²³ without

²¹ The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. See, e. g., Boddie v. Connecticut, 401 U. S. 377, 378, and cases cited therein. But some form of notice and hearing—formal or informal—is required before deprivation of a property interest that "cannot be characterized as de minimus." Sniadach v. Family Finance Corp., supra, at 342 (Harlan, J., concurring).

²² A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell v. Burson, supra*, at 540–541; *Goldberg v. Kelly, supra*, at 261. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials, and perhaps more, than mediocre ones." Stanley v. Illinois, — U. S. —, —.

²³ Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. See, e. g., Sniadach v. Family Finance Corp., supra. In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a

opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States,²⁴ to meet the needs of a national war effort,²⁵ to protect

bank failure. Coffin Brothers & Co. v. Bennett, 277 U. S. 29. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. Ownbey v. Morgan, 256 U. S. 94. It is much less clear what interests were involved in the third case, decided with an unexplicated per curiam opinion simply citing Coffin Brothers and Ownbey. McKay v. McInnes, 279 U. S. 820. As far as essential procedural due process doctrine goes, McKay cannot stand for any more than was established in the Coffin Brothers and Ownbey cases on which it relied completely. See Sniadach v. Family Finance Corp., supra, at 340; id., at 344 (Harlan, J., concurring).

In cases involving deprivation of other interests, such as government employment, the Court similarly has required an unusually important governmental need to outweigh the right to a prior hearing. See, e. g., Cafeteria Workers v. McElroy, 367 U. S. 886, 895-896.

Seizure under a search warrant is quite a different matter, see n. 30, infra.

that "[d]elay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." Id., at 597 (emphasis supplied). The Court, then relied on "the need of the government promptly to secure its revenues." Id., at 596.

²⁵ Central Union Trust Co. v. Garvan, 254 U. S. 554, 566; Stoehr
 v. Wallace, 255 U. S. 239, 245; United States v. Pfitsch, 256 U. S. 547,

against the economic disaster of a bank failure, 20 and to protect the public from misbranded drugs 27 and contaminated food. 28

The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake.²⁹ The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health.

In any event, the aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an opportunity to be heard. Since the issues and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forgo their opportunity, sensing the futility of the exercise in the particular case. And, of course, no hearing need be held unless the defendant, having received notice of his opportunity takes advantage of it.

²⁶ Fahey v. Mallonee, 332 U.S. 245.

²⁷ Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594.

²⁸ North American Storage Co. v. Chicago, 211 U. S. 306.

²⁰ By allowing repossession without an opportunity for a prior hearing, the Florida and Pennsylvania statutes may be intended specifically to reduce the costs for the private party seeking to seize goods in another party's possession. Even if the private gain at stake in repossession actions were equal to the great public interests recognized in this Court's past decisions, see nn. 24–28, supra, the Court has made clear that the avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right. See n. 22, supra. The appellees argue that the cost of holding hearings may be especially onerous in the context of the creditor-debtor relationship. But the Court's holding in Sniadach v. Family Finance Corp., supra, undisputably demonstrates that ordinary hearing costs are no more able to override due process rights in the creditor-debtor context than in other contexts.

Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not "narrowly drawn to meet such unusual condition." Sniadach v. Family Finance Corp., supra, at 339. And no such unusual situation is presented by the facts of these cases.

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.³⁰

³⁰ The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need-e. g., the apprehension and conviction of criminals-rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued. But cf. A Quantity of Books v. Kansas, 378 U.S. 205.

VII

Finally, we must consider the contention that the appellants who signed conditional sales contracts thereby waived their basic procedural due process rights. The contract signed by Mrs. Fuentes provided that "in the event of default of any payment or payments, Seller at its option may take back the merchandise" The contracts signed by the Pennsylvania appellants similarly provided that the seller "may retake" or "repossess" the merchandise in the event of a "default in any payment." These terms were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning.

In D. H. Overmuer Co. v. Frick Co., 405 U. S. 174. the Court recently outlined the considerations relevant to determination of a contractual waiver of due process Applying the standards governing waiver of constitutional rights in a criminal proceeding 31-although not holding that such standards must necessarily apply-the Court held that, on the particular facts of that case, the contractual waiver of due process rights was "voluntarily, intelligently and knowingly" Id., at 187. The contract in Overmuer was negotiated between two corporations; the waiver provision was specifically bargained for and drafted by their lawyers in the process of these negotiations. As the Court noted, it was "not a case of unequal bargaining power or overreaching. The Overmyer-Frick agree-

³¹ See Brady v. United States, 397 U. S. 742, 748; Johnson v. Zerbst, 304 U. S. 458, 464. In the civil area, the Court has said that "we do not presume acquiescence in the loss of fundamental rights," Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U. S. 292, 307. Indeed, in the civil no less than the criminal area, "courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U. S. 389, 393.

ment, from the start, was not a contract of adhesion." Id., at 186. Both parties were "aware of the significance" of the waiver provision. Ibid.

The facts of the present cases are a far cry from those of Overmyer. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

The Court in Overmyer observed that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue." Id., at 188. Yet, as in Overmyer, there is no need in the present cases to canvass those consequences fully. For a waiver of constitutional rights in any context must, at the very least, be clear. The contractual language relied upon must, on its face, amount to a waiver.

The conditional sales contracts here simply provided that upon a default the seller "may take back," "may retake" or "may repossess" merchandise. The contracts included nothing about the waiver of a prior hearing. They did not indicate how or through what process—a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing—the seller could take back the goods. Rather, the purported waiver provisions here are no more than a statement of the seller's right to repossession upon occurrence of certain events. The appellees do not suggest that these provisions waived the appellants' right to a full post-seizure hearing to determine whether those

events had, in fact, occurred and to consider any other available defenses. By the same token, the language of the purported waiver provisions did not waive the appellants' constitutional right to a preseizure hearing of some kind.

VIII

We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.32 ing, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication.33 Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. "[D]ue process is afforded only

³² We do not reach the appellant's argument with the Florida and Pennsylvania statutory procedures violate the Fourth Amendment, made applicable to the States by the Fourteenth. See n. 2, supra. For once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated. There is no need for us to decide that question at this point.

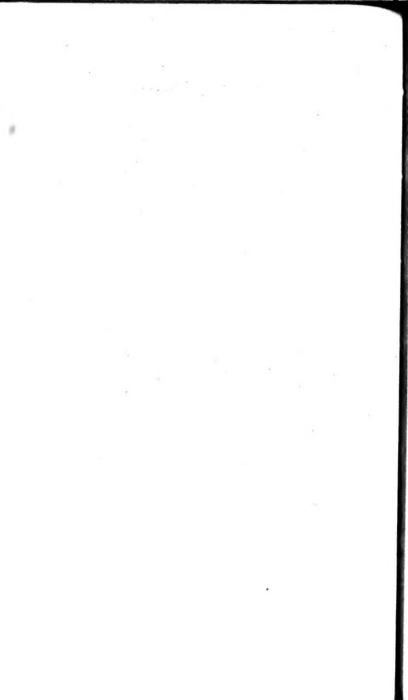
³³ Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute.

by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property" Sniadach v. Family Finance Corp., supra, at 343 (Harlan, J., concurring). See Bell v. Burson, supra, at 540; Goldberg v. Kelly, supra, at 267.

For the foregoing reasons, the judgments of the district courts are vacated and these cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Powell and Mr. Justice Rehnquist did not participate in the consideration or decision of these cases.



SUPREME COURT OF THE UNITED STATES

Nos. 70-5039 AND 70-5138

Margarita Fuentes et al.,
Appellants,
70-5039 v.
Robert L. Shevin, Attorney
General of Florida, et al.

Paul Parham et al., Appellants, 70-5138 v. Americo V. Cortese et al. On Appeal from the United States District Court for the Southern District of Florida.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June 12, 1972]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

Because the Court's opinion and judgment improvidently, in my view, call into question important aspects of the statutes of almost all the States governing secured transactions and the procedure for repossessing personal property, I must dissent for the reasons which follow.

First: It is my view that when the federal actions were filed in these cases and the respective District Courts proceeded to judgment there were state court proceedings in progress. It seems apparent to me that the judgments should be vacated and the District Courts instructed to reconsider these cases in the light of the principles announced in Younger v. Harris, 401 U. S. 37 (1971); Samuels v. Mackell, id., at 66; Boyle v. Landry, id., at 77; and Perez v. Ledesma, id., at 82.

In No. 70-5039, the Florida statutes provide for the commencement of an action of replevin, with bond, by serving a writ summoning the defendant to answer the complaint. Thereupon the sheriff may seize the property, subject to repossession by defendant within three

days upon filing of a counterbond, failing which the property is delivered to plaintiff to await final judgment in the replevin action. Fla. Stat. § 78.01 et seq. (1969). This procedure was attacked in a complaint filed by petitioner Fuentes in the federal court, alleging that an affidavit in replevin had been filed by Firestone Tire & Rubber Company in the Small Claims Court of Dade County, that a writ of replevin had been issued pursuant thereto and duly served, together with the affidavit and complaint, and that a trial date had been set in the Small Claims Court. Firestone's answer admitted that the replevin action was pending in the Small Claims Court and asserted that Mrs. Fuentes, plaintiff in the federal court and appellant here, had not denied her default or alleged that she had the right to possession of the property. Clearly, state court proceedings were pending, no bad faith or harassment was alleged and no irreparable injury appeared that could not have been averted by raising constitutional objections in the pending state court proceeding. In this posture, it would appear that the case should be reconsidered under Younger v. Harris and companion cases, which were announced after the District Court's judgment.

In No. 70-5138, Pennsylvania Rule of Civil Procedure 1073 expressly provides that an "action of replevin with bond shall be commenced by filing with the prothonotary a precipe for writ of replevin with bond" When the writ issues and is served, the plaintiff has three days to file counterbond and should he care to have a hearing he may file his own praccipe, in which event the plaintiff must proceed further in the action by filing and serving his complaint.

In the cases before us, actions in replevin were commenced in accordance with the rules, and appellee Sears, Roebuck and Company urged in the District Court that plaintiffs had "adequate remedies at law which they could pursue in state court proceedings which are still pending in accordance with the statutes and rules of Pennsylvania." App. 60. Under Younger v. Harris and companion cases, the District Court's judgment should be vacated and the case reconsidered.

Second: It goes without saying that in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid, the seller early in the transaction often having more at stake than the buyer. Neither is it disputed that the buyer's right to possession is conditioned upon his making the stipulated payments and that upon default the seller is entitled to possession. Finally, there is no question in these cases that if default is disputed by the buyer he has the opportunity for a full hearing and that if he prevails he may have the property or its full value as damages.

The narrow issue, as the Court notes, is whether it comports with due process to permit the seller, pending final judgment, to take possession of the property through a writ of replevin served by the sheriff without affording the buyer opportunity to insist that the seller establish at a hearing that there is reasonable basis for his claim of default. The interests of the buyer and seller are obviously antagonistic during this interim period: the buyer wants the use of the property pending final judgment: the seller's interest is to prevent further use and deterioration in his security. By the Florida and Pennsylvania law the property is for all intents and purposes placed in custody and immobilized during this time. The buyer loses use of the property temporarily but is protected against loss: the seller is protected against deterioration of the property but must undertake by bond to make the buyer whole in the event the latter prevails.

In considering whether this resolution of conflicting interests is unconstitutional, much depends on one's perceptions of the practical considerations involved. The Court holds it constitutionally essential to afford opportunity for a probable cause hearing prior to repossession. Its stated purpose is "to prevent unfair and mistaken deprivations of the property." But in these typical situations, the buyer-debtor has either defaulted or he has not. If there is a default, it would seem not only "fair," but essential, that the creditor be allowed to repossess; and I cannot say that the likelihood of a mistaken claim of default is sufficiently real or recurring to justify a broad constitutional requirement that a creditor do more than the typical state law requires and permits him to do. Sellers are normally in the business of selling and collecting the price for their merchandise. I could be quite wrong, but it would not seem in the creditor's interest for a default occasioning repossession to occur; as a practical matter it would much better serve his interests if the transaction goes forward and is completed as planned. Dollar and cents considerations weigh heavily against false claims of default as well as against precipitate action that would allow no opportunity for mistakes to surface and be corrected.* Nor does it seem to me that creditors would

^{*}Appellants Paul and Ellen Parham admitted in their complaints that they were delinquent in their payments. They stipulated to this effect as well as to receipt of notices of delinquency prior to institution of the replevin action, and the District Court so found. Appellant Epps alleged in his complaint that he was not in default. The defendant, Government Employees Exchange Corp., answered that Epps was in default in the amount of \$311.25 as of August 9, 1970, that the entire sum due had been demanded in accordance with the relevant documents and that Epps had failed and refused to pay that sum. The District Court did not resolve this factual dispute. It did find that Epps earned in excess of \$10,000 per year and that the agreements Epps and Parham entered

lightly undertake the expense of instituting replevin actions and putting up bonds.

The Court relies on prior cases, particularly Goldberg v. Kelly, 397 U. S. 254 (1970); Bell v. Burson, 402 U. S. 535 (1971) and Stanley v. Illinois, - U. S. - (1972). But these cases provide no automatic test for determining whether and when due process of law requires adversary proceedings. Indeed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . [W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria Workers v. McElroy. 367 U. S. 886, 895 (1961). See also Stanley v. Illinois, — U. S. —, — (1972); Goldberg v. Kelly, 397 U. S. 254, 263 (1970). Viewing the issue before us in this light, I would not construe the Due Process Clause to require the creditors to do more than they have done in these cases to secure possession pending final hearing. Certainly, I would not ig-

into complied with the provisions of Pennsylvania's Uniform Commercial Code and its Services and Installment Sales Act.

As for appellant Rosabelle Andrews Washington, the District Court, based on the allegations of her complaint, entered a temporary restraining order requiring that the property seized from her be returned forthwith. At a subsequent hearing the order was dissolved, the court finding "that the representations upon which the temporary restraining order of September 18, 1970, issued were incorrect, both as to allegations contained in the complaint and representations made by counsel." (App. 29.)

It was stipulated between appellant Fuentes and defendants in the District Court that Mrs. Fuentes was in default at the time the replevin action was filed and that notices to this effect were sent to her over several months prior to institution of the suit. (App. 25-26.) nore, as the Court does, the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest. Surely under the Court's own definition, the creditor has a "property" interest as deserving of protection as that of the debtor. At least the debtor, who is very likely uninterested in a speedy resolution that could terminate his use of the property, should be required to make those payments, into court or otherwise, upon which his right to possession is conditioned. Cf. Lindsay v. Normet, — U. S. — (1972).

Third: The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all. Alternatively, they need only give a few days' notice of a hearing, take possession if hearing is waived or if there is default; and if hearing is necessary merely establish probable cause for asserting that default has occurred. It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide. On the contrary, the availability of credit may well be diminished or, in any event, the expense of securing it increased.

None of this seems worth the candle to me. The procedure which the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. The Uniform Commercial Code, which now so pervasively

governs the subject matter with which it deals, provides in Art. 9, § 9-503, that:

"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of peace or may proceed by action"

Recent studies have suggested no changes in Art. 9 in this respect. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report, § 9-503 (April 25, 1971). I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.

IN THE

Supreme Court of the United States

October Term, 1970

No. 70-5138

Supreme Court, U. S. FILED

JUL 6 1972

MICHAEL RODAK, JR., CLER

PAUL PARHAM and ELLEN PARHAM et al.,
Appellants

v.

SEARS, ROEBUCK and CO. et al., Appellee

PETITION FOR REHEARING

On Appeal from the United States District Court for the Eastern District of Pennsylvania

ROBERT F. MAXWELL,
Attorney for Sears, Roebuck and Co.,
Appellee

P. O. Box 6742 4640 Roosevelt Boulevard Philadelphia, Pa. 19132

Supreme Court of the United States

October Term, 1970

No. 70-5138

PAUL PARHAM and ELLEN PARHAM et al.,

Appellants

v.

SEARS, ROEBUCK and CO. et al., Appellee

PETITION FOR REHEARING

Because of the close division of the seven justices as to the constitutionality of an ancient and widely accepted type of procedure, the effect this decision may have upon the credit and commercial systems of the nation, and the fact that the majority opinion indicates a serious misunderstanding of Pennsylvania procedures and the true status of the two Pennsylvania cases on appeal, it is respectfully requested that the Court seriously consider rehearing this entire matter.

The Court misunderstood the law of Pennsylvania and the status of the cases before it in that it says:

1. On Page 9 of its opinion: "The party seeking the writ is not obliged to institute a court action for repossession", citing Pennsylvania Rule of Civil Procedure 1073.

Actually no writ of any sort can be issued in Pennsylvania except by a duly constituted court in which an action has been instituted. Rule 1073 specifically states:

"(a) An action of Replevin with Bond shall be commenced by filing with the Prothonotary a praecipe for a writ of Replevin with bond, together with. . . ." All actions in Pennsylvania can be started either by filing a praecipe for a writ, a complaint or an agreement for an amicable action (See Rule 1007 Pennsylvania Rules of Civil Procedure which is the rule for assumpsit actions and general contract actions, Rule 1041 governing trespass or tort actions, and 1071, 1073 governing Replevin, [12 Purdon's Penna. Statutes Annotated—Rules of Civil Procedure] all of which so provide).

Pennsylvania retains the ancient common law procedure of starting actions with writs and this is exactly what was done in the instant cases (see P. 96 of the record for the lower court's opinion explaining this, the copies of the various papers filed in Common Pleas Court of Philadelphia County (Exhibits H and I on pp. 77 et seq., of Record), the Pennsylvania trial court of general jurisdiction, wherein these actions were commenced and are still pending, all of the said papers (including the praecipe, the writ, the affidavit and the bond) clearly bearing the term, number and name of the Common Pleas Court Action; e.g., Court of Common Pleas of Philadelphia County, Sept. Term 1970, No. 737. See also Holmes, "The Common Law" (1881) (1901), where he states on Page 274, "After the Norman Conquest all ordinary actions were begun by a writ. . . . These writs were issued as a matter of course in the various well-known actions from which they took their names."

See also the stipulation of counsel on Page 69 of the Record, Paragraph 10, stating that Replevin with Bond is an *Action*, and Paragraph 13 indicating the numerous rights of the defendant and procedures available to the defendant in that very action.

2. The statement of the Court on Page 10 of its opinion that "If the party who loses property through Replevin seizure is to get even a post seizure hearing, he must initiate a law suit himself." This is simply not so as is clearly explained in Paragraph 13 of the Stipulation of

Counsel on Page 69 of the Record where the procedures open to the defendant in the Replevin Action pending in these cases are clearly set forth. A defendant in a Replevin action cannot in Pennsylvania nor in most states institute a replevin action against property in custodia legis. His remedy is to move or plead in the pending action to dispute the Plaintiff's right to possession, and he may do so by a number of means available to him in the state court action pending against him: Pennsylvania Rules of Civil Procedure 1076, 1078, 1079, 1080, 1082, 1084, 1085.

3. The statement on Pages 9 and 10 that the party initiating Replevin "need not even formally allege that he is lawfully entitled to the property" fails to consider the fact that the plaintiff itself or through its duly authorized agent with notarized power of attorney attached must execute and file a bond, as was done in this case, in which it averred under seal that the condition of the bond was such that if it failed to maintain its right of possession of the property it shall pay to the parties entitled the value of the property, all legal costs, fees and damages sustained by reason of the issuance of the said writ of replevin. Rule 1084 Pa. R.C.P. provides clearly for entry of damages against a plaintiff instituting the action improvidently either before or after trial. (12 P.S. Rules CP 77.) The Supreme Court of Pennsylvania held in Herdic v. Young, 55 Pa. 176, 177 (1867) that "where a writ of replevin is sued out fraudulently and without color of right, a jury would be warranted in giving even exemplary damages. . . . "

The use of a bond in this manner with a statement of what happens if a plaintiff does not sustain his rights is a long established method of pleading in many types of proceedings including the guarantees of trustees, executors, appeals and supersedeas, etc. This is a clear verification under seal of the plaintiff's claim of possession. Further, of course, the entire action can only be instituted for possession or under a claim of possession so that the filing of the praecipe in itself establishes that the claim is one to possession.

4. The statement on Page 8 that ". . . a prothonotary rather than a court clerk issues the writ" adds to the confusion since the word Prothonotary means the Court Clerk, and the Prothonotary is the Court Clerk of the Court of Common Pleas in Pennsylvania. Black's Law Dictionary, 3rd Edition, Page 1453: "Prothonotary: 'Title given to an officer who officiates as principal clerk of some courts.'; Whitney v. Hopkins, 135 Pa. 246, 19 A 1075." Even the Clerk of the Pennsylvania Supreme Court is so designated.

5. The Court's statement on Page 11 that the ancient common law required an action in detinue rather than Replevin to regain goods rightfully taken but wrongfully detained would appear to be of little weight when the Supreme Court itself speaking through Chief Justice Marshall in the case of Slocum v. Mayberry, 2 Wheat 1, 4 L.Ed. 169 (Vol. II, Page 1) (1817) sustained the Courts of Rhode Island in upholding a summary writ of Replevin issued by Rhode Island on behalf of a private party against a revenue agent of the United States acting on behalf of the United States. In that case, the seizure of the vessel and the cargo was proper, but the retention of the cargo was improper. In emphasizing the importance of the summary remedy even against the sovereign itself. the Chief Justice stated on Page 8, "... it would have been a wanton oppression to expose them to loss by a continued deterioration. . . . "

As the Supreme Court then indicated, Replevin in American practice was at a very early date extended to goods either wrongfully taken or wrongfully detained.

The text cited by the Court on Page 11 of its opinion to support its statement that a creditor at common law had to invoke detinue in cases where there was an improper detention without a wrongful taking makes it quite clear that this was not true in American common law practice because "in America, it (Replevin) was frequently used instead of detinue." (Page 368, 369, Plucknett—"A Concise History of the Common Law.")

Even in the English Practice, however, the authoritative practice text used for over a century in numerous

editions indicates that there is grave doubt that detinue instead of Replevin was required. Page 811, Chitty General Practice. Volume I, (Edition 1834) reads as follows:

"Replevin is not (as until recently had been generally but erroneously supposed, 3 Blackstone Commentaries 146) confined to cases of wrongful distress, but is an immediate summary remedy in all cases where there has been a wrongful taking, even by force or in any manner otherwise than by process in execution; and it should seem that even goods illegally detained may be replevied."

In support of the use of Replevin for goods merely wrongfully detained, it cites a number of ancient authorities. "Ex parte Chamberlain 1 Schol. and Lef. 320; Shannon v. Shannon Id. 324; Le Mason v. Dixon Sir W. Jones, 173, 174; Years Books 6 Hen 7, 8, 9, Bishop v.

Viscountess Montague, Cro. Eliz. 824."

6. The theory enunciated by the Court on Page 10 of its opinion that common law Replevin actions bear little resemblance to modern Replevin actions and that Replevin was used only for specific goods "wrongfully distrained" is denied by the very text on which the Court relies: Holdsworth, "History of English Law" (1927),

which states in Note 9 on Page 285 of Volume 3:

"Even Blackstone seems to have thought it only lay for a distrainee, but as Ames points out (H.L.R. X 1375) there is a clear case against this view in 1608, Godholt, P. 1, 195, cp. Comyn digest, Replevin A; Gilbert Distress (4th Ed.) 80; 1 Co. Rep. 54A, note where it is said: 'a replevin is a remedy which lies to recover damages for an immediate wrong without force, in taking and detaining cattle and goods, whether by distress for rent, damage feasant, etc., or otherwise."

See also 12 Edward II Case No. 10 (decided in 1319) (reprinted Selden Society Publications Vol. 81, Page 75 [1964]). The court upheld the writ of replevin where the defendant had lawfully taken possession of trespassing cattle but was wrongfully retaining them; also 11 Edward II, Pages 48, 50 (1317) Selden Society Publications Vol.

61 and Case 122 on Page 121 of Selden Society Publications Volume 60, the said case being decided in 1253

during the reign of Henry III.

The Registers of Writs of the Court Clerks of England indicate that the writs of replevin as issued in ancient days commanded the Sheriff to seize all types of personal property and were not limited to property distrained. The registers also indicate that the Sheriff was commanded to seize the property prior to hearing and hearings were not called for until and unless the defendant made a claim of property in the goods which had been replevied. See Registers of Writs, as published by the Selden Society, 1970, Vol. 87, particularly Writs CC 85, CC 86, CC 87 (Page 59); CA 21 (Page 24). These writs date from the 13th and 14th Centuries.

It would thus appear that contrary to the Court's reading of history and in accordance with the very authorities it cites, the definition of due process at ancient common law both in England and its North American Colonies, and due process in the United States as recognized by the authorities and courts at the time the Constitution was adopted and the Fourteenth Amendment enacted included the type of proceeding which the Court has now declared unconstitutional. The historical grounds on which the Court partially based its decision would therefore appear not to sustain that decision.

Therefore, your petitioner respectfully suggests that the Court may wish to reconsider its decision on this important constitutional question based on what your petitioner believes is a misunderstanding of the cases before the court, the law applicable thereto, and the relevant history of the common law and of due process.

ROBERT F. MAXWELL

CERTIFICATE

I, as attorney for Sears, Roebuck and Co., petitioner, do hereby certify that this Petition for Rehearing is interposed in good faith for the reasons stated therein and not for purposes of delay.

ROBERT F. MAXWELL